

United States District Court

Middle

DISTRICT OF

Tennessee

National Wildlife Federation, Sierra Club,
and Tennessee Clean Water Network, et al.

SUMMONS IN A CIVIL CASE

V.

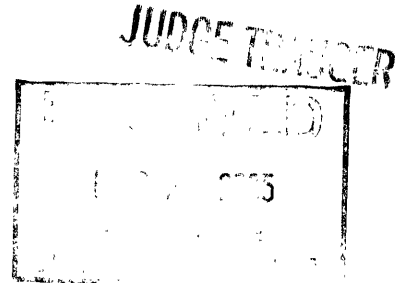
CASE NUMBER:

3 05 0217

U.S. Army Corps of Engineers; Lieutenant General
Robert B. Flowers, Commander of the Corps; and
U.S. Environmental Protection Agency; Stephen L.
Johnson, Acting Administrator of the EPA

TO (Name and address of defendant)

United States Environmental Protection Agency
Stephen L. Johnson, Acting Administrator
Ariel Rios Building
1200 Pennsylvania Ave., NW
Washington, DC 20460



YOU ARE HEREBY SUMMONED and required to serve upon PLAINTIFF'S ATTORNEY (name and address)

Joe W. McCaleb
Joe W. McCaleb and Associates
315 W. Main St., Suite 112
Hendersonville, TN 37075

an answer to the complaint which is herewith served upon you, within 60 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint. You must also file your answer with the Clerk of this Court within a reasonable period of time after service.

KEITH THROCKMORTON

MAR 16 2005

CLERK

DATE

E. D. McCoy
(BY) DEPUTY CLERK

SERVICE COPY

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE

2005 MAR 15 11:11:22

NAT'L WILDLIFE FEDERATION, et. al

v.

U.S. ARMY CORPS OF ENGINEERS, et. al

No. 3:05-0217

Judge Trauger

Magistrate Judge Knowles

NOTICE OF SETTING OF INITIAL CASE MANAGEMENT CONFERENCE

Pursuant to Local Rule 11, effective January 1, 2001, notice is hereby given that the initial case management conference before Judge Trauger is scheduled in the chambers of Judge Trauger, 801 Broadway, Room 825, Nashville, TN, at 9:30 a. m., on Monday, May 9, 2005.

LEAD TRIAL COUNSEL FOR EACH PARTY is required to attend the initial case management conference. Appearance by counsel at the initial case management conference will not be deemed to waive any defenses to personal jurisdiction. Counsel should bring their calendars with them to the conference as deadlines for the progression of the case and a trial date will be set at that time. Counsel for the filing party should notify the courtroom deputy for Judge Trauger if any of the defendants has not been served prior to the scheduled conference date.

Pursuant to Local Rule 11(d), counsel for all parties shall, at the initiative of the plaintiff's counsel, confer prior to the initial case management conference as required by Fed. R. Civ. P. 26(f) to discuss the issues enumerated in Local Rule 11(d)(1)(c) and (2) and to determine if any issues can be resolved by agreement subject to the Court's approval. Counsel for all parties shall, at the initiative of plaintiff's counsel, prepare a proposed case management order and deliver it to Judge Trauger's chambers **AT LEAST 3 BUSINESS DAYS PRIOR TO THE SCHEDULED CONFERENCE. The attached standard provisions are to be included in Judge Trauger's case management orders.**

Pursuant to Fed. R. Civ. P. 26(d), discovery is stayed until the initial case management conference. Unless exempted by Fed. R. Civ. P. 26(a)(1)(E), all cases are subject to the required initial disclosure requirements of Rule 26(a)(1).

PURSUANT TO LOCAL RULE 11(d)(1), COUNSEL FOR THE PARTY FILING THIS LAWSUIT MUST SERVE A COPY OF THIS NOTICE ON THE OTHER PARTIES TO THIS LAWSUIT ALONG WITH THE SUMMONS AND COMPLAINT OR WITH THE REQUEST FOR WAIVER OF SERVICE UNDER FED R. CIV. P. 4(d), OR WITH THE SERVICE COPY OF THE NOTICE OF REMOVAL.

**STANDARD PROVISIONS TO BE
INCLUDED IN JUDGE TRAUGER'S
CASE MANAGEMENT ORDERS**

1. The court has jurisdiction of this case pursuant to _____.
(cite statute(s))

Jurisdiction is _____.
(disputed or not disputed)
2. Mandatory initial disclosures. Pursuant to Fed. R. Civ. P. 26(a)(1), all parties must make their initial disclosures within 14 days after the initial case management conference.
3. Discovery. Discovery is not stayed during dispositive motions, unless ordered by the court. Local Rule 9(a)(2) is expanded to allow 40 interrogatories, including sub-parts. No motions concerning discovery are to be filed until after the parties have conferred in good faith and, unable to resolve their differences, have scheduled and participated in a conference telephone call with Judge Trauger.
4. Dispositive motions. Briefs shall not exceed 20 pages. Courtesy copies of briefs delivered to chambers at the time of filing are appreciated. No motion for **partial** summary judgment shall be filed except upon leave of court. Any party wishing to file such a motion shall first file a separate motion that gives the justification for filing a partial summary judgment motion in terms of the overall economy of time and expense for the parties, counsel and the court.

**THESE PROVISIONS MUST BE INCLUDED IN ALL CASE MANAGEMENT ORDERS.
THEIR LOCATION WITHIN THE ORDER ARE WITHIN THE DISCRETION OF THE
LAWYER WHO PREPARES THE ORDER.**

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE

NOTICE OF NEW CIVIL ACTION

TO: ALL COUNSEL DATE: March 16, 2005
FROM: CLERK OF COURT
RE: NAT'L WILDLIFE FEDERATION, et. al v. U.S. ARMY CORPS OF
ENGINEERS, et. al
CASE NO.: 3:05-0217

This civil action is assigned to Judge Trauger and Judge Knowles.

NOTICE REGARDING CONSENT OF THE PARTIES

Pursuant to 28 U.S.C. § 636(c), as amended, and Rule 73(b) of the Federal Rules of Civil Procedure, this Court has designated the Magistrate Judges of this District to conduct any or all proceedings in civil cases, upon consent of the parties. The parties may consent to have this civil action tried on the merits before the Magistrate Judge, either as a bench trial or a jury trial. The parties may consent to have the Magistrate Judge enter final judgment in the case or may consent to have the Magistrate Judge decide specific matters in the case, such as dispositive motions. To exercise your right to consent in this case, **all parties** must consent in writing by signing the attached form. Under Rule 73(b), however, no party shall inform the District Court, the Magistrate Judge or the Clerk of any party's response, unless all parties consent. See generally Rules 72-76 of the Federal Rules of Civil Procedure.

If all parties agree to the assignment of this case to the Magistrate Judge, an appeal, if any, shall be taken directly to the U. S. Court of Appeals as provided in 28 U.S.C. § 636(c)(3) and Rule 73(c). Further review may be taken to the U. S. Supreme Court by writ of certiorari.

Some of the advantages of consenting to proceed before the Magistrate Judge are: (1) that it results in early and firm trial dates; (2) that it avoids any duplication in de novo review by the District Judge of the Orders or Reports and Recommendations of the Magistrate Judge who is assigned to the case; and (3) that it alleviates the increasing demands of criminal cases on the District Judges.

The Court normally allows and encourages the parties to consent at any time during the pretrial proceedings, including immediately preceding the scheduled trial.

**DO NOT RETURN THE ATTACHED FORM UNLESS ALL PARTIES CONSENT
TO PROCEED BEFORE THE MAGISTRATE JUDGE.**

casentc.frm

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

NAT'L WILDLIFE FEDERATION, et. al)
)
) No. 3:05-0217
v.)
) District Judge Trauger
U.S. ARMY CORPS OF ENGINEERS, et. al)
) Magistrate Judge Knowles

CONSENT OF THE PARTIES

Pursuant to 28 U.S.C. § 636(c), Rule 73(b) of the Federal Rules of Civil Procedure, and Local Rule 301 of the Local Rules for Magistrate Proceedings,

() All parties consent to have a United States Magistrate Judge conduct any and all further proceedings including the entry of judgment in this civil action OR all parties authorize the Magistrate Judge to decide the following matters:

Any appeal shall be to the U. S. Court of Appeals as provided in 28 U.S.C. § 636(c)(3) and Rule 73(c).

SIGNATURES OF ALL COUNSEL OF RECORD AND ANY UNREPRESENTED PARTY ARE REQUIRED.

Attorney for Plaintiff/Plaintiff

Attorney for Defendant/Defendant

Attorney for Plaintiff/Plaintiff

Attorney for Defendant/Defendant

Attorney for Plaintiff/Plaintiff

Attorney for Defendant/Defendant

If necessary, attach an additional page with additional signatures of counsel or parties.

DO NOT FILE THIS FORM UNLESS ALL PARTIES CONSENT TO PROCEED BEFORE THE
MAGISTRATE JUDGE.

consent.frm (3/97)

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION**

NATIONAL WILDLIFE FEDERATION
1400 16th Street, N.W., Suite 501
Washington, D.C. 20036;

TENNESSEE CLEAN WATER NETWORK
706 Walnut Street
Suite 200
Knoxville, Tennessee 37228;

TENNESSEE ENVIRONMENTAL COUNCIL
One Vantage Way
Suite D-105
Nashville, Tennessee 37228;

SIERRA CLUB
85 Second Street, Second Floor
San Francisco, CA 94105; and

PUBLIC EMPLOYEES FOR ENVIRONMENTAL
RESPONSIBILITY
Tennessee Chapter
4443 Pecan Valley Road
Nashville, Tennessee 37218;
Plaintiffs,

v.

UNITED STATES ARMY CORPS OF ENGINEERS,
an agency of the United States; Lieutenant General
ROBERT B. FLOWERS, Commander of the Corps;
and

UNITED STATES ENVIRONMENTAL PROTECTION
AGENCY, an agency of the United States; and STEPHEN
L. JOHNSON, Acting Administrator United States
Environmental Protection Agency;
Defendants.

Civil No. **8 05 0217**

JUDGE [illegible]

COMPLAINT FOR DECLARATORY RELIEF

INTRODUCTION

1. This is an action filed pursuant to citizen suit provision Section 505(a)(2) of the Federal Water Pollution Control Act, as amended (commonly referred to as the "Clean Water Act" or "CWA"), 33 U.S.C. § 1365(a)(2), and the Administrative Procedure Act, 5 U.S.C. § 701 et. seq. (the "APA") against Defendants the United States Army Corps of Engineers (the "Corps") and the United States Environmental Protection Agency ("EPA") for their failure to comply with the requirements of Sections 301 and 404 of the CWA, 33 U.S.C. §§ 1311 and 1344, and the relevant implementing regulations thereunder, 33 C.F.R. Parts 320, 323, 325 and 328, in connection with the proposal of the Upper Cumberland Regional Airport ("UCRA") to fill and destroy over 10 acres of wetlands (the "UCRA Wetlands") in order to construct additional runway capacity and a fueling station, among other additions, to its airport facility in Cookeville, Tennessee (the "UCRA Project"). Plaintiffs seek a declaratory judgment that the Corps' determination is unlawful and invalid and that the wetlands at issue are "waters of the United States" requiring CWA protection.

JURISDICTION AND VENUE

2. This Court has jurisdiction pursuant to the CWA Section 505(a)(2), 33 U.S.C. § 1365(a)(2), because it is alleged that the Defendants have failed to perform specific non-discretionary duties under the CWA. This Court has further jurisdiction and authority to review this case pursuant to 28 U.S.C. § 1331 (federal question) and 2201-2202 (declaratory judgment), and 5 U.S.C. §§ 701-706 (APA).

3. Venue is proper in the United States District Court for the Middle District of Tennessee pursuant to 28 U.S.C. § 1391(e)(2) and 16 U.S.C. § 1540(g)(3)(A) because the

events, violations and property at issue occurred and exist within this District. There is a present and actual controversy between the parties to this action.

4. By letter dated August 24, 2004, a 60-day notice of intent to sue letter was served on the Defendants and other appropriate persons by Plaintiffs, pursuant to 33 U.S.C. § 1365(b). The letter included an expert dye trace report provided to the Corps by the Plaintiffs that positively demonstrates a hydrological connection between the UCRA Wetlands and the navigable-in-fact Falling Water River. A true and correct copy of that letter, along with the attached report, is attached hereto as Exhibit A and incorporated herein by reference.

5. Defendants received such notice, and sixty days have elapsed since receipt. Therefore, Plaintiffs have satisfied the notice requirement of CWA Section 505(b)(2), 33 U.S.C. § 1365(b)(2).

6. Plaintiffs have exhausted any administrative remedies and have no administrative remedies for the matters raised herein. Moreover, in an attempt to avoid litigation, Plaintiffs, through a series of written and verbal correspondence, have attempted to persuade the Corps to assert jurisdiction over these wetlands. However, the Corps has failed to provide any satisfactory response to Plaintiffs' requests for several months.

PARTIES

Plaintiffs

7. Plaintiff National Wildlife Federation ("NWF") is the nation's largest member-supported nonprofit conservation advocacy and education organization. NWF has approximately one million individual members nationwide, and affiliate organizations in 46 states and territories, including Tennessee. NWF is headquartered in Reston, Virginia,

with field offices throughout the United States. The mission of NWF is to educate, mobilize, and advocate to preserve and strengthen protection for wildlife and wild places. A major concern of NWF is the protection of water resources, such as wetlands. NWF is particularly concerned with ensuring that Clean Water Act protection is properly given to water resources after the Supreme Court's ruling in *Solid Waste Agency of Northern Cook County v. United States*, 531 U.S. 159 (2001). Since its founding in 1936, NWF has been advocating for the protection of vital resources, such as wetlands, streams and rivers, upon which wildlife depends.

8. Plaintiff Public Employees for Environmental Responsibility ("PEER") is a national non-profit corporation based in Washington, D.C. with chapters throughout the United States, including Tennessee. PEER represents current and former federal, state, and local employees of land management, wildlife protection, pollution control agencies, and the general public concerned about assuring that governmental agencies correctly enforce their statutory environmental mandates. PEER is concerned with ensuring that agencies charged with administering the CWA fully extend its protections to all jurisdictional waters. PEER members working for government agencies are sometimes caught in a conflict between their duties as employees, their ethical beliefs, and the risk of disciplinary action for insubordination. As such, PEER members rely on PEER to bring actions on their behalf.

9. The Sierra Club is a nonprofit corporation organized under California law with approximately 750,000 members in 63 chapters nationally, including over 7,000 members in Tennessee. The Sierra Club is dedicated to exploring, enjoying and protecting the wild places of the Earth; to practicing and promoting the responsible use of

the Earth's resources and ecosystems; to educating and enlisting humanity to protect and restore the quality of the natural and human environment; and to using all lawful means to carry out these objectives. One of the Sierra Club's priority national conservation campaigns is the campaign to protect our nation's waters, and in particular promote the conservation of waters that may be denied protection because they are purported to be isolated. A current focal point of the campaign is to ensure that wetlands, which historically have been protected by the Corps and the EPA, remain protected. The Sierra Club's particular interest in this case stems from the past, present and future harm to the environment caused by or threatened by the expansion of the UCRA.

10. Plaintiff Tennessee Clean Water Network ("TCWN") is a non-profit corporation headquartered in Knox County, Tennessee, composed of approximately 171 individual and organizational members. TCWN is dedicated solely to protecting, restoring and enhancing Tennessee's waters and the communities that depend on them. TCWN believes that water is the common thread that ties all life together and that maintaining clean water protects the health of our families and provides numerous recreational opportunities while sustaining plants, animals, and aquatic life. TCWN is, therefore, committed to ensuring that waters in Tennessee receive proper protection under the law.

11. Plaintiff Tennessee Environmental Council ("TEC") is a non-profit organization incorporated under the laws of the State of Tennessee that is dedicated to protecting and restoring water quality throughout the state. TEC has both individual and organizational members with a collective membership of over 400 individuals from throughout the State of Tennessee and beyond. TEC is dedicated to protecting its members' recreational, aesthetic, business, and environmental interests in waters of Tennessee from unregulated

pollution and destruction.

12. Plaintiffs have members who reside near, use, and enjoy the waters, adjacent habitat, and dependent wildlife which will be affected by the Corps' determination that the UCRA Wetlands are not waters of the United States. These organizations and their members' interests in the wetlands, and in other waters in the Falling Water River, Caney Fork River and Cumberland River basins will be directly and irreparable injured by the destruction of the UCRA Wetlands and the resulting degradation of these other waters. Plaintiffs' members reside in, work in, or regularly visit, use, and enjoy the area that would be affected by the expansion of the UCRA. Plaintiffs' members fish and canoe in these rivers, hike and hunt along their banks, and enjoy observing wildlife in and near these rivers and their headwaters. Plaintiffs' members also have an aesthetic and health interest in keeping the waters free of pollutants. Plaintiffs' members have testified at public meetings and submitted comments opposing the destruction of these wetlands. Unless the relief sought herein is granted, the aesthetic, recreational, environmental and other substantial interests of the Plaintiffs and their members will continue to be adversely affected and irreparably injured by the Defendants' unlawful and arbitrary actions and omissions.

Defendants

13. Defendant, United States Army Corps of Engineers, is an agency of the United States, organized and existing within the Department of the Army. The Corps is responsible for decisions with respect to the application of the permitting requirements of Section 404 of the CWA to particular projects, including the UCRA Project. The Corps is the federal agency that took the final agency action challenged herein.

14. Defendant, Lieutenant General Robert B. Flowers, is Commander of the Corps and is sued in his official capacity. His official residence is 441 G Street, N.W., Washington, D.C. 20314. Pursuant to the Clean Water Act and the regulations promulgated thereunder, Defendant Flowers is charged with the responsibility of overseeing the activities and duties of the Corps regarding decisions with respect to the application of the permitting requirements of Section 404 of the CWA to particular projects, including the UCRA Project.

15. Defendant, the United States Environmental Protection Agency, is charged with the administration of the Clean Water Act. EPA has ultimate responsibility for all decisions made under Section 404 of the CWA relating to jurisdiction and permitting. *See* 33 U.S.C. § 1344(c).

16. Defendant, Stephen L. Johnson, is the Acting Administrator of the Environmental Protection Agency and is sued in his official capacity. His official residence is 1200 Pennsylvania Avenue, N.W., Washington, D.C. 20460. Pursuant to the Clean Water Act and the regulations promulgated thereunder, Acting Administrator Johnson is charged with the supervision and management of all EPA decisions and actions, including the administration of the Clean Water Act.

STATUTORY AND REGULATORY BACKGROUND

The Clean Water Act

17. The central objective of the CWA is to “restore and maintain the chemical, physical and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a). To achieve this goal, Congress prohibited the dredge or fill material into the navigable waters of the United States absent a permit issued by the Secretary of the Army, acting

through the Corps. 33 U.S.C. §§ 1311(a), 1344(a).

18. The jurisdictional scope of the CWA is based upon “navigable waters,” defined in Section 502(7) of the CWA, 33 U.S.C. § 1362(7) to mean “the waters of the United States.”

19. Under applicable Corps’ regulations, “tributaries of waters identified in paragraphs (a)(1)-(4) of [the Corps’ regulations, covering water used or susceptible to use in interstate or foreign commerce, all interstate waters, other waters the use of which may have impacts in interstate commerce, and impoundments]” are subject to Clean Water Act jurisdiction. 33 C.F.R. § 328.3(5).

20. Also, under applicable Corps’ regulations, “wetlands adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a)(1)-(6) of [the Corps’ regulations, which include those waters identified in paragraph 19 above, plus tributaries to such waters and the territorial seas]” are subject to Clean Water Act jurisdiction. 33 C.F.R. § 328.3(7).

21. The scope of Clean Water Act jurisdiction is broad and applies to “virtually all bodies of water.” *International Paper v. Ouellette*, 474 U.S. 481, 492 (1987). Wetland areas with ecological and hydrological connectivity to larger water bodies, even if such connection is remote and by subsurface water flow, are adjacent and/or tributary to other waters and therefore jurisdictional under the Clean Water Act. *See e.g. Riverside Bayview Homes v. U.S. Army Corps of Engineers*, 474 U.S. 121, 134-135 (1987).

22. Section 301(a) of the CWA prohibits the dredging or filling of “waters of the United States,” including wetlands, unless the Secretary of the Army, acting through the Corps, authorizes such activity under Section 404 of the CWA. 33 U.S.C. § 1344.

Section 404 of the CWA allows that, "The Secretary may issue permits, after notice and opportunity for public hearings, for the discharge of dredged or fill material into the navigable waters at specified disposal sites." 33 U.S.C. § 1344(a).

23. Section 404 of the CWA places a non-discretionary duty on the Corps to regulate the dredging and filling of waters of the United States. 33 U.S.C. § 1344. To fulfill this duty, the Corps must make reasoned wetland determinations, including properly asserting jurisdiction over waters of the United States. *National Wildlife Federation v. Hanson*, 859 F.2d 313, 315 (4th Cir. 1988), *citing*, *Riverside Bayview Homes*, 474 U.S. at 138-139.

24. EPA has oversight responsibility for the protection of wetlands. The Corps acts as EPA's agent, pursuant to a Memorandum of Understanding, when it renders wetland and other jurisdictional determinations. EPA has the authority to block or override permit decisions made by the Corps. *See* 33 U.S.C. § 1344(c).

The Administrative Procedure Act

25. The Administrative Procedure Act provides for judicial review of agency actions, such as the Corps' determination that the UCRA wetlands are not waters of the United States. Agency actions, findings or conclusions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" are prohibited and may be overturned by a district court. 5 U.S.C. § 706(2)(A).

26. The Corps is a federal agency subject to the APA. When the Corps determined that the UCRA wetlands are not waters of the United States, it performed an agency action subject to judicial review under the APA.

27. The APA provides that a court shall set aside agency "findings, conclusions, and actions" that are "arbitrary, capricious, or an abuse of discretion of otherwise not in

accordance with law.” 5 U.S.C. § 706(2)(A).

28. The reviewing court must carefully “consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error in judgment.” *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971).

FACTUAL BASIS FOR PLAINTIFFS’ CLAIMS

29. UCRA has proposed to expand the airport by extending the runway on the west side of existing hangars and administration buildings and by the filling and destruction of the UCRA Wetlands, which sit to the east of the airport, for the purpose of additional hangars and other landslide construction, including a fueling station.

30. The UCRA Wetlands consist of three separate wetlands and cover approximately 10.08 acres. Wetland 1 consists of 7.9 acres, Wetland 2 consists of .806, and Wetland 3 consists of 1.37 acres. Together, they have about 3.4 acres of open water. The rest of the wetland area consists of various vegetation, shrubs and trees. The UCRA Wetlands were historically part of a larger wetland system that has been altered somewhat by filling that occurred in past road and airport construction activities. Nevertheless, the wetlands’ hydrologic regime and nutrient cycling are still highly functioning. Their biotic community is moderately functioning, and would likely demonstrate higher functioning quality were the buffer surrounding the wetland not degraded by agricultural activity and airport development.

31. It is undisputed that the UCRA Wetlands are wetlands.

32. The UCRA Wetlands occur because of a thin layer of clay-rich, impermeable Quaternary alluvium that keeps the water on the surface. Water leaves the UCRA Wetlands via a small stream and quickly sinks into a cavernous limestone layer located

below the Quaternary alluvium. The water from the UCRA Wetlands then flows north through the porous limestone before first re-emerging at a spring on the other side of the UCRA. The water then again flows on the surface for another short distance before re-entering the sub-surface, flowing through a second cavernous limestone layer. The water continues to flow to the north and west through this karstic limestone until its re-emerges at a spring located on the south side of Falling Water River, approximately one-half mile away. From this spring, the water flows directly into the Falling Water River.

33. The Falling Water River is a navigable-in-fact water and a "water of the United States" jurisdictional under the Clean Water Act. The Falling Water River is tributary to the Caney Fork River, which is tributary to the Cumberland River. Both the Caney Fork River and the Cumberland River are navigable waters that are "waters of the United States" jurisdictional under the Clean Water Act.

34. The UCRA Wetlands and the out-flowing stream are part of a unique aquatic system created by the karst, or cavernous, geology that defines the region. It is common for streams, tributaries and other connecting waters in the area to periodically flow through sinkholes, caves and other subsurface structures before reemerging above ground, often times directly into navigable-in-fact waters.

35. The UCRA Wetlands are hydrologically connected through surface and subsurface flow to the Falling Water River. The hydrologic connection between the UCRA Wetlands and the Falling Water River are typical of the karstic geology of the region, with surface flow occurring over impermeable ground layers and subsurface flow occurring through cavernous limestone areas at two points on its way into the nearby Falling Water River.

36. The hydrological connection between the UCRA Wetlands and other waters was affirmed by the Tennessee Department of Environment and Conservation, which concluded in a recent letter that, "The field review [of the wetlands] resulted in our finding that the discharge from the wetland may after certain storm events connect with other waters of the state." Letter from Mike Lee, Environmental Specialist, to Mary Mastin, Esq., Paddock and Mastin at 1 (June 22, 2004) (Attached as Exhibit B).

37. The UCRA Wetlands have an ecological connection to the Falling Water River and function as part of the same ecosystem as the river. The UCRA Wetlands support diverse plant species found in the Falling Water River and Caney Fork River basins, including buttonbush (*Cephalanthus occidentalis*), several species of sedge, soft rush (*Juncu effuses*), and wool-grass (*Scirpus cyperinus*). They also provide habitat for a diverse array of wildlife species in the Falling Water River and Caney Fork River basins, including barking tree frogs, a rare amphibian species that has been determined to be "deemed in need of management" by the state of Tennessee. The state and federally listed endangered gray bat has been known to use the wetland area.

38. The flow from the UCRA Wetlands protects water quality and ensures that an adequate supply of clean, flowing water is maintained in the Falling Water River. Segments of the Falling Water River are already impaired for organic enrichment, low dissolved oxygen and siltation. Similarly, segments of the Caney Fork River are impaired for thermal modifications, flow alterations and low dissolved oxygen. Destroying these headwater wetlands will likely exacerbate the deleterious effects of pollution and changes in temperature by cutting off the flow of clean water, further degrading these rivers.

39. All of the wetlands at the UCRA are “waters of the United States” under the Clean Water Act given their hydrological and ecological connection to navigable-in-fact waters.

40. On August 5, 2002, Richard Rinks, an engineer working for the UCRA, wrote a short two page letter to the Corps. The letter stated that Mr. Rinks needed to know “what to do to accomplish this project” and continued to acknowledge that three wetland areas would be impacted. The two paragraph discussion of the wetlands was reserved to stating that the wetlands were essential to the project. The only supporting data provided was a basic sketch of the airport with no surrounding identifiers, scale, or elevation indicators. Letter from Richard C. Rinks, President, Richard C. Rinks & Associates, to Mr. Mike Lee, Tennessee Department of Environment & Conservation and Mr. Carl Olsen, U.S. Army Corps of Engineers (August 5, 2002) (Attached as Exhibit C).

41. The Nashville District of the Army Corps of Engineers Regulatory Specialist, Maryellen J. Ehman responded to Mr. Rink’s letter a little over a month later stating, “*based on the information provided in your letter*, we have determined that the proposed work would not involve the discharge of fill material in waters of the US. In this regard, a Department of the Army permit is not required for this project.” (emphasis added). Letter from Mary J. Ellen, Regulatory Specialist, U.S. Army Corps of Engineers, to Richard C. Rinks, President, Richard C. Rinks & Associates (September 11, 2002) (Attached as Exhibit D).

42. There is no indication in the record that the Corps considered subsurface hydrological or ecological connectivity in making its determination.

COUNT ONE

Clean Water Act

43. Plaintiffs reallege and incorporate by reference the forgoing paragraphs.

44. On September 11, 2002 the Corps issued a jurisdictional determination which found the UCRA Wetlands are not “waters of the US” and therefore not jurisdictional under the Clean Water Act.

45. Since the UCRA Wetlands are “waters of the United States,” the Corps’ has a mandatory duty to regulate these wetlands and prohibit any dredge and fill activities in the wetlands without a permit.

46. The Corps’ failure to assert jurisdiction over the UCRA Wetlands is a failure to perform the agency’s duty under Sections 301 and 404 of the CWA. 33 U.S.C. §§ 1311 and 1344.

47. Because EPA has the ultimate responsibility under the CWA to protect wetlands and other waters, EPA’s failure to override or block the Corps’ refusal to assert CWA jurisdiction over the UCRA Wetlands is a failure by the Administrator to perform his duties under Sections 301 and 404 of the CWA. 33 U.S.C. §§ 1311 and 1344; *National Wildlife Federation v. Hanson*, 859 F.2d 313 (4th Cir. 1988).

COUNT TWO

Administrative Procedure Act

48. Plaintiffs reallege and incorporate by reference the forgoing paragraphs.

49. The Corps’ jurisdictional determination on September 11, 2002 is a final agency subject to review by this Court.

50. The Corps’ jurisdictional determination is arbitrary and capricious and an abuse of its discretion.

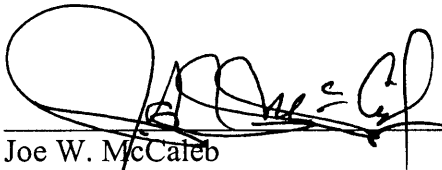
51. The Corps' jurisdictional determination is contrary to the law, is not supported by substantial evidence in the administrative record, is unreasonable, is a clear error of judgment and failed to apply the express provisions of the Clean Water Act and the applicable provisions of the Corps' governing regulations.

PRAYER FOR RELIEF

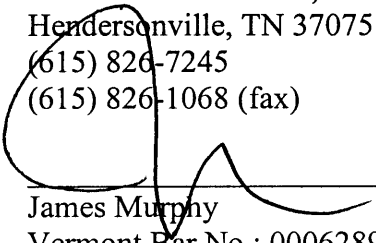
Based upon these facts and matters of law, plaintiffs respectfully request that the Court:

1. Declare that the Corps' jurisdictional determination that the UCRA Wetlands are not jurisdictional is arbitrary and capricious, contrary to law, a clear error of judgment and a violation of the Administrative Procedure Act.
2. Declare that the entirety of the UCRA Wetlands are "waters of the United States" subject to CWA jurisdiction.
3. Declare that the Corps and EPA have failed to perform their mandatory duties under Sections 301 and 404 of the Clean Water Act to assert jurisdiction over the UCRA Wetlands.
4. Award Plaintiffs their costs of litigation pursuant to the CWA and the Equal Access to Justice Act, including reasonable attorneys' and expert witness fees
5. Award any other relief the Court deems necessary and proper.

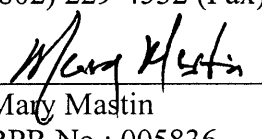
This 16th day of March, 2005.



Joe W. McCaleb
BPR No.: 003505
Joe W. McCaleb and Associates
Attorneys at Law
315 West Main Street, Suite 112
Hendersonville, TN 37075
(615) 826-7245
(615) 826-1068 (fax)



James Murphy
Vermont Bar No.: 000628938
National Wildlife Federation
58 State Street
Montpelier, VT 05602
(802) 229-0650
(802) 229-4532 (Fax)



Mary Mastin, by permission

Mary Mastin
BPR No.: 005836
Paddock & Mastin
Attorneys At Law
360 Roberts Hollow Lane
Cookeville, Tennessee 38501-9224
(931) 268-2938 (phone and fax)

Attorneys for Plaintiffs

EXHIBITS LIST

Exhibit A. Notice of Intent to Sue Letter from James Murphy, Counsel for National Wildlife Federation, Sierra Club, Public Employees for Environmental Responsibility, Tennessee Clean Water Network, and Tennessee Environmental Council, to The Honorable Michael Leavitt, Administrator, Environmental Protection Agency, The Honorable Les Brownlee, Acting Secretary of the Army, Mr. William L. James, Chief, Eastern Section, Army Corps of Engineers (August 24, 2004), with Attachment.

Exhibit B. Letter from Mike Lee, Environmental Specialist, to Mary Mastin, Esq., Paddock and Mastin at 1 (June 22, 2004).

Exhibit C. Letter from Richard C. Rinks, President, Richard C. Rinks & Associates, to Mr. Mike Lee, Tennessee Department of Environment & Conservation and Mr. Carl Olsen, U.S. Army Corps of Engineers (August 5, 2002).

Exhibit D. Letter from Maryellen J. Ehmann, Regulatory Specialist, U.S. Army Corps of Engineers, to Richard C. Rinks, President, Richard C. Rinks & Associates (September 11, 2002).



NATIONAL WILDLIFE FEDERATION®

People and Nature: Our Future Is in the Balance

Office of Federal and International Affairs

August 24, 2004

CERTIFIED MAIL – RETURN RECEIPT REQUESTED

The Honorable Michael Leavitt
Administrator
Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

The Honorable Les Brownlee
Acting Secretary of the Army
101 Army Pentagon
Washington, D.C. 20310-0101

Mr. William L. James
Chief, Eastern Section
Regulatory Branch
U.S. Army Corps of Engineers, Nashville District
3701 Bell Road
Nashville, TN 37214-2660

Re: Notice of Intent to Sue: Clean Water Act Violations – Upper Cumberland Regional Airport, between Cookeville and Sparta, White County, Tennessee.

Dear Administrator Leavitt, Acting Secretary Brownlee, and Regulatory Branch Chief James:

Pursuant to the citizen suit provision of the Clean Water Act ("CWA" or the "Act"), 33 U.S.C. § 1365(b), the National Wildlife Federation ("NWF"), Sierra Club, Public Employees for Environmental Responsibility ("PEER"), Tennessee Clean Water Network ("TCWN"), and Tennessee Environmental Council ("TEC"),¹ on behalf of themselves and their members, hereby

¹ NWF is the nation's largest citizen-supported not-for-profit conservation advocacy and education organization. Its address and telephone number are: 1400 16th Street, N.W., Washington, D.C. 20036, attn: James Murphy, Wetlands and Water Resources Counsel; phone: (202) 797-6800. Sierra Club is a national, non-profit environmental and conservation organization dedicated to the protection of public health and the environment. Its address and telephone number are: 85 Second Street, 2nd Floor, San Francisco, CA 94105, attn: Kristin Henry, Esq.; phone: (415) 977-5500. PEER, which has an active Tennessee Chapter office, is a national alliance of local, state and federal resource professionals focused on defending the environment from pollution. Its address and phone number are: 4443 Pecan Valley Road, Nashville, TN 37218, attn: Barry Sulkin; phone: (615) 313-7066. TCWN is a non-profit corporation with a mission to protect, enhance and restore the waters of Tennessee and the communities that

EXHIBIT A

notify the Administrator of the Environmental Protection Agency ("EPA"), the Acting Secretary of the Army, and the Regulatory Branch Chief, Eastern Section, Nashville District, U.S. Army Corps of Engineers of a failure to perform a nondiscretionary act or duty under the CWA. In particular, the U.S. Army Corps of Engineers, Nashville District (the "Corps"), failed to assert CWA jurisdiction over three wetlands located to the east of the developed portion of the Upper Cumberland Regional Airport, 750 Airport Road, between Cookeville and Sparta, White County, Tennessee, approximate longitude and latitude W85° 31.587' and N36° 3.373', respectively (the "Site").

Background

This notice concerns expansion plans by the Upper Cumberland Regional Airport ("UCRA") that call for filling three separate wetland areas to the east of the airport. The UCRA was built in the 1960s and expanded in 1973. Growth in Cookeville and in the region generally has led to a perceived need to expand airport service to the area. The proposed expansion would purportedly fill this perceived need.

Even if expansion of the UCRA were necessary to serve the area or for safety reasons, the Tennessee Department of Environment and Conservation ("TDEC"), Division of Water Pollution Control, has been critical of UCRA's failure to structure the project to avoid destruction of the wetlands. According to the TDEC, "No avoidance or even slight minimization [of impacts to the wetlands] has been attempted." Letter from Mike Lee, Environmental Specialist, to Thomas E. Heineke, Ph.D, Heineke and Associates at 1 (May 12, 2003). In a subsequent letter, the TDEC wrote as follows:

It has been brought to the attention of the Division that UCRA proposes to utilize an adjacent 40 acre parcel for borrow material. This area lies south/southeast of the existing facility. *The Division believes that this area can be readily utilized for any and all proposed airport expansion....* The Division ... believes that there are practicable alternatives to the 7.9 acre wetland area [Wetland 1 of 3].

Letter from Mike Lee, Environmental Specialist, to Thomas E. Heineke, Ph.D, Heineke and Associates at 1 (Sep. 11, 2003) (emphasis supplied).

depend on them. Its address and phone number are: 706 Walnut Street, Suite 200, Knoxville, TN 37228, attn: Renee Hoyos, Executive Director; phone: (865) 522-7007. TEC is a not-for-profit organization with members across Tennessee that educates and advocates for the protection of Tennessee's environment and public health. Its address and telephone number are: One Vantage Way, Suite D-105, Nashville, TN 37228, attn: Will Callaway, Executive Director; phone: (615) 248-6500.

The Site

Together, the three wetlands that would be affected by the UCRA expansion cover approximately 10.08 acres. They have been labeled as Wetland 1, which consists of 7.9 acres, Wetland 2, which consists of .806 acres, and Wetland 3, which consists of 1.37 acres. They have approximately 3.4 acres of open water. Letter from Thomas E. Heineke, Ph.D., Heineke & Associates, to Mike Lee, Tennessee Department of Environment & Conservation at 1 (Mar. 6, 2003). In fact, the wetlands are able to support navigation by a small boat and have been fished. These wetlands were historically part of a larger wetland system that has been altered somewhat by filling that occurred in past road and airport construction. Letter from Thomas Roberts and Kenneth L. Morgan, to Richard Rinks, Richard C. Rinks and Associates (Jan. 7, 2004) ("*Roberts Letter*"). Nevertheless, the wetlands' hydrologic regime and nutrient cycling are still highly functioning. *Id.* Their biotic community is moderately functioning, and would likely demonstrate higher functioning quality were the buffer surrounding the wetland not degraded by agricultural activity and airport development. *Id.*

The wetlands and the out-flowing stream are part of a unique aquatic system created by the karst geology that defines the region. It is common for streams, tributaries and other connecting waters in the area to periodically flow through sinkholes, caves and other subsurface structures before reemerging above ground, often times directly into navigable-in-fact waters. The unique quality of this area has been nationally recognized. For instance, the Cumberland Plateau and surrounding area, of which this is a part, has been labeled a "bio-gem" by a leading conservation group. Biogems: A Project of the Natural Resources Defense Council – Cumberland Plateau, available at (<http://www.savebiogems.org/cumberland>) (site last visited June 8, 2004).

The wetlands are hydrologically connected through surface and subsurface flow to the Falling Water River, a navigable water of the United States with some of the most scenic waterfalls and hiking areas in all of Tennessee which is located about a half-mile away from the wetlands. This hydrological connection was confirmed by a dye test conducted by Albert Ogden, Ph.D., P.G., who described the connection:

The waters that leave the wetlands east of the airport and soon sink into the ground, re-emerge first at Airport Spring (Figure 1). This spring water then flows on the surface for only a short distance before re-entering the sub-surface. These sinking waters then emerge at Farley Spring located on the south side of Falling Water River. *The results of the investigation conclusively establish a hydrologic connection between the waters leaving the wetlands and Farley Spring, which contributes flow to the Falling Water River.*

Ground Water Tracing Results from the Wetlands Adjacent to the Upper Cumberland Regional Airport, Sparta, Tennessee, Albert E. Ogden, Ph.D., P.G. at 8-9 (June 24, 2004) (prepared for Joe

McCaleb and Mary Mastin, Attorneys at Law) (emphasis supplied) (copy attached). Dr. Ogden's report demonstrates in great detail how the hydrologic connection between the wetlands and the Falling Water River are typical of karstic geology of the region, with surface flow occurring over impermeable ground layers and subsurface flow occurring through cavernous limestone areas at two points on its way into the Falling Water River. *See id.* at 1-4 and 6-8.

Moreover, this hydrological connection was also affirmed by TDEC, which concluded in a recent letter that, "The field review [of the wetlands] resulted in our finding that the discharge from the wetland may after certain storm events connect with other waters of the state." Letter from Mike Lee, Environmental Specialist, to Mary Mastin, Esq., Paddock and Mastin at 1 (June 22, 2004).

The wetlands also have an ecological connection to the Falling Water River, and indeed are part of the same ecosystem. They support diverse plant species, including buttonbush (*Cephalanthus occidentalis*), several species of sedge, soft rush (*Juncus effusus*), wool-grass (*Scirpus cyperinus*), and possibly the endangered yellow-eyed grass. *Roberts Letter, Compensatory Mitigation Proposal: Aquatic Resource Alteration Permit, Upper Cumberland Regional Airport Expansion, White County Tennessee* at 4, Heineke & Associates, Inc. (Mar. 2003) (prepared for Upper Cumberland Regional Airport). They also provide habitat for a diverse array of wildlife species in the Falling Water River basin, including barking tree frogs, a rare amphibian species that has been determined to be "deemed in need of management" by the state of Tennessee. *A Guide to Rare Animals of Tennessee*, TDEC, Division of Natural Heritage at 1 (May 2004). The state and federally listed endangered gray bat has been known to use the wetland area. *Finding of No Significant Impact: Proposed 1000-Foot Runway Extension, Pavement Strengthening, Taxiway Extension, Apron Expansions, Upper Cumberland Regional Airport, Sparta, Tennessee*, Tennessee Department of Transportation, Aeronautics Division, Nashville, Tennessee at 4 (May 2004).

The flow from these wetlands protects water quality and ensures that an adequate supply of clean, flowing water is maintained in the Falling Water River. Segments of the Falling Water River are already impaired for organic enrichment, low dissolved oxygen and siltation. Similarly, segments of the Caney Fork River are impaired for thermal modifications, flow alterations and low dissolved oxygen. Tennessee 2002 303(d) List. Destroying these headwater wetlands will likely exacerbate the deleterious effects of pollution and changes in temperature by cutting off the flow of clean water, further degrading these rivers.

The Corps' Determination of No Jurisdiction

The Corps appears to have based its initial determination that it does not have jurisdiction over the wetlands on information provided by Richard C. Rinks, a consultant who was apparently retained by the UCRA. The information Mr. Rinks provided contained no meaningful information regarding the hydrology or ecological function of the wetlands, only a justification for destroying them:

The need to utilize these wetlands is critical for the airport to expand in a cost effective manner. All of the wetlands contribute to fog and water fowl activity, which is a safety concern to all aircraft utilizing the airport, especially jet aircraft. Other birds such as black birds and starlings also create a hazard to aircraft. With many on time deliveries for local industry, and corporate travel, the airport must serve a safe vital role to the economics of the region.

Letter from Richard C. Rinks, President, RCR&A, to Mike Lee, TDEC and Carl Olsen, U.S. Army Corps of Engineers, Nashville District, Regulatory Branch at 2 (Aug. 5, 2002). Mr. Rinks went on to plead, again without describing the hydrology of the wetlands, that the fill activities were necessary for the airport expansion.

In response to Mr. Rinks, the Corps stated as follows:

Based upon the information provided in your letter, we have determined that the proposed work would not involve the discharge of fill material in waters of the US. In this regard, a Department of Army permit is not required for this project.

Letter from Maryellen Ehmann, Regulatory Specialist, to Richard C. Rinks (Sep. 11, 2002). The letter contained no other justification for not asserting jurisdiction, nor any discussion of the hydrology or ecology of the wetlands.

More than a year later, the Corps justified its decision not to regulate the wetlands by citing the decision of the U.S. Supreme Court in *Solid Waste Agency of Northern Cook County ("SWANCC") v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001), and mentioning the Corps' inability to regulate "wetland fill based solely on the use of those 'non-navigable, isolated, intrastate' waters by migratory birds." Letter from Carl L. Olsen, Project Manager, to Mary Mastin (Oct. 1, 2003). The Corps failed, however, to provide a reasoned explanation for its decision not to regulate the wetlands, or even to indicate that use by migratory birds was a factor in its decision.

After Ms. Mastin specifically alerted the Corps to the hydrological connection in a letter from Ms. Mastin to Carl L. Olsen, Project Manager at the Corp, Letter from Mary Mastin, Attorney, to Carl L. Olsen, Project Manager (March 12, 2004), the Corps responded as follows:

Mr. Carl Olsen visited the site on March 24, 2004, to further investigate issues raised in your letter. He traced the drainage from the wetland through the installed pipe to the first sinkhole, across a short length of a grassed swale to a streambed, and then to a second sinkhole. The flow from the wetland subsides in the streambed approximately 150' before it reaches the second

sinkhole. There are two other surface channels in this depressional feature that also drain into the sinkhole. The wetland area has no surface connection to waters of the U.S. In this regard, we found nothing that would cause us to change our previous determination that this wetland is an isolated water and as such is not subject to our regulatory jurisdiction pursuant to Section 404 of the Clean Water Act.

Letter from William James, Chief, Eastern Regulatory Section, Corps of Engineers, to Mary Mastin, Paddock & Mastin (Apr. 20, 2004).

Consequences of the Corps' Determination

The Corps' failure to assert jurisdiction means the wetlands will be turned into an airport runway and, apparently, a fueling pad without CWA protection. The likely existence of a practicable alternative to the destruction of the wetlands makes the Corps' failure to assert jurisdiction all the more troubling. Guidelines promulgated under CWA § 404(b)(1) require that a permit be issued only for the least environmentally damaging alternative. See 40 C.F.R. § 230.10(a). The Guidelines establish rebuttable presumptions that (1) alternatives for non-water dependent activities that do not involve wetlands exist; and (2) alternatives that do not involve wetlands have less adverse impact on the aquatic environment. *Id.* § 230.10(a)(3). An airport expansion is not a water dependent activity, placing the burden squarely on the UCRA to demonstrate that alternatives that avoid or minimize wetland impacts are not available. Given that a substantial upland area appears available for the expansion, a permit should not be issued.

Had the Corps properly asserted jurisdiction, the important analysis required by the 404(b)(1) Guidelines would have taken place and the loss of these wetlands could be avoided. In addition, the Corps would have consulted with U.S. Fish and Wildlife Service regarding possible threatened or endangered species that might be affected if a permit is issued, pursuant to the Corps' regulations. 33 C.F.R. § 325.2(b)(5). As it is, no such consultation has taken place.

Even were the Corps to have issued a permit following the requisite analysis and consultation, mitigation likely would have been required that would protect the wetlands and systems functioning within this important region.

Some mitigation is occurring under State law, but its efficacy is extremely questionable. One problem is that the mitigation would take place far off-site, 13.2 miles away, and would consist largely of additional plantings and dispersal of waste, such as logs, from the planned destruction of the UCRA wetlands. See *Compensatory Mitigation Proposal: Aquatic Resource Alteration Permit, Upper Cumberland Regional Airport Expansion, White County Tennessee*, Heineke & Associates, Inc. at 2, 4-10 (Mar. 2003) (prepared for Upper Cumberland Regional Airport). Furthermore, the Tennessee Wildlife Resources Agency regarded the UCRA's proposed mitigation with acute skepticism, stating as follows:

[I]t is difficult to conceive how the restoration component would occur since it seems to be located in the heart of existing wetlands. The creation component appears to be an excavated extension of the larger existing wetland. Enhancement could involve a wide variety of measures with varying levels of appropriate credit. Preservation should NOT be a credited component of the plan, especially in this case where there is no indication of the reserved property's future vulnerability. ... The Tennessee Wildlife Resources Agency requests that this permit not be issued with the mitigation 'plan' in its present form.

Letter from Dan Sherry, Fish and Wildlife Environmentalist, TN Wildlife Resources Agency, to Mike Lee, TDEC at 1 (Jun. 9, 2003) (capitalization in original).

The Clean Water Act Requires the Corps to Assert Jurisdiction Over Wetlands Which Are Hydrologically and Ecologically Connected to Navigable-in-Fact Waters

In 1972, Congress enacted the Federal Water Pollution Control Act, commonly known as the Clean Water Act, to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters" and "eliminate" the discharge of pollutants into navigable waters. 33 U.S.C. § 1251(a). To achieve this goal, the CWA prohibits the "discharge of any pollutant by any person" without compliance with the Act's permit procedures and other requirements. *Id.* § 1311(a).

The CWA places a nondiscretionary duty on the Corps to regulate the dredging and filling of waters of the United States. 33 U.S.C. § 1344. To fulfill this duty, the Corps must make reasoned wetland determinations. *National Wildlife Federation v. Hanson*, 859 F.2d 313, 315 (4th Cir. 1988), citing, *Riverside Bayview Homes v. U.S. Army Corps of Engineers*, 474 U.S. 121, 138-139 (1987). EPA has the authority to block or override permit decisions made by the Corps. 33 U.S.C. § 1344(c).

The scope of waters that the Corps is charged to regulate under the CWA is broad. The *SWANCC* decision narrowly ruled that an abandoned sand and gravel pit with no hydrologic connection to other waters was not covered under the CWA where the only ground for federal jurisdiction was the use of the pit by migratory birds. *SWANCC* explicitly upheld the Supreme Court's ruling in *Riverside Bayview Homes*, which held that wetlands adjacent to other waters are covered under the CWA. *SWANCC* also left intact the Supreme Court's ruling in *International Paper v. Ouellette*, where the Court stated that, "The [Clean Water] Act applies to ... virtually all bodies of water." 474 U.S. 481, 492 (1987).

Cases decided since *SWANCC* was issued confirm that it applies only to a narrow subset of waters where the only ground for asserting federal jurisdiction is the use of the waters by migratory birds. Three circuits have held that wetlands which are adjacent to non-navigable tributaries (including drains and ditches) of navigable waters, are clearly within the jurisdiction

of the CWA, even if such drains or ditches are artificially constructed and intermittently flowing. *United States v. Rapanos*, 339 F.3d 447 (6th Cir., August 5, 2003), *cert. denied*, 124 S.Ct. 1875 (April 5, 2004), *rehearing denied*, 124 S.Ct. 2407 (May 24, 2004); *Treacy v. Newdunn*, 344 F.3d 407 (4th Cir., September 10, 2003), *cert. denied*, 124 S.Ct. 1874 (April 5, 2004); *United States v. Deaton*, 332 F.3d 698 (4th Cir. June 12, 2003), *cert. denied*, 124 S.Ct. 1874 (April 5, 2004); *Headwaters, Inc. v. Talent Irrigation District*, 243 F.3d 526 (9th Cir. 2001). In addition, two district courts since *SWANCC* have held that groundwater connectivity to navigable waters is adequate to establish jurisdiction under the CWA. *Northern California River Watch v. City of Healdsburg*, No. C 01-0468 WHA (N.D.Ca. January 23, 2004) (ruling that a pond with surrounding wetlands and the subterranean ground flow connecting it to a navigable in fact river are "tributaries" and that such waters are covered under the CWA); *Idaho Rural Council v. Bosma*, 143 F.Supp.2d 1169 (D.Idaho 2001) (holding that the CWA extends federal jurisdiction over groundwater that is hydrologically connected to surface waters that are themselves waters of the United States).

Courts have also ruled that hydrological connectivity and ecological connectivity together make wetland areas "adjacent" to other waters of the United States, and therefore jurisdictional under the CWA. See *Riverside Bayview Homes*, at 134-135; *Healdsburg*, at 10. This holds true even where the wetlands or waters at issue are removed by a substantial amount of distance from navigable-in-fact waters. See *United States v. Banks*, 115 F.3d 916, 921 (11th Cir. 1997) (wetlands that were at least one half mile from navigable waters were jurisdictional due to a hydrologic connection that "was primarily through groundwater, but also occurred through surface water during storms" and "ecological adjacency based on the water connections and the fact that the lots serve as habitat for birds, fish, turtles, snakes and other wildlife"); *United States v. Tilton*, 705 F.2d 429, n. 1 (11th Cir. 1983) (wetlands were adjacent, and therefore jurisdictional, because of ecological adjacency and hydrological adjacency that occurred mainly through groundwater, though occasional surface water connections could occur during extremely high tide events, like hurricanes).

Finally, Corps regulations, which survived *SWANCC*, define "waters of the United States" as:

(3) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce including any such waters:

(i) which are or could be used by interstate or foreign travelers for recreational or other purposes; or

(ii) from which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(iii) which are used or could be used for industrial purposes by industries in interstate commerce;...

(5) *Tributaries of waters* identified in paragraphs (a) (1) through (4) of this section [which identifies all waters described in paragraph (a) (3) above and all waters subject to the ebb and flow of the tide, all interstate waters, all other waters which could affect interstate commerce, and all impoundments of waters otherwise defined as waters of the United States], ; ...

(7) *Wetlands adjacent to waters* (other than waters that are themselves wetlands) identified in paragraphs (a) (1) through (6) of this section [Subsection 6 identifies territorial seas as waters of the United States].

33 C.F.R. § 328.3 (3), (5) and (7) (emphasis supplied).

Failure to Perform a Nondiscretionary Duty

The Corps failed to perform a nondiscretionary duty under the CWA when it declined to assert jurisdiction over the wetlands at the Site and regulate the dredge and fill activity proposed there by UCRA. As described above, these wetlands have a hydrologic and ecological connection to navigable waters of the United States and are therefore plainly covered under the CWA. These waters also are or could be used in interstate commerce for fishing, boating and other recreational activities, and are navigable by small watercraft. The failure of the Corps to regulate the dredging and filling of these wetlands constitutes a dereliction of the Corps' duties under Section 404 of the CWA. Moreover, the EPA failed to exert authority over this clearly erroneous decision by the Corps, leaving these wetlands unprotected. See 33 U.S.C. § 1344(c).

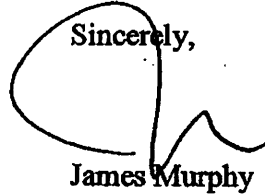
This sixty day notice will give the Corps and EPA another opportunity to correct their course of action.

Conclusion

NWF, Sierra Club, PEER, TCWN, and TEC believe that development can occur in a manner that preserves precious wetland areas, complies with the CWA and allows for smart growth and regional economic expansion. They stand ready to work towards a cooperative solution that ensures proper compliance with the CWA in this instance. They are committed to ensuring that the CWA is enforced to the full limit of its coverage, however.

If you have any questions, or would like to discuss this matter further, please contact me.

Sincerely,



James Murphy
Wetlands and Water Resources Counsel

cc: James Palmer, Regional Administrator
Region IV, U.S. EPA
61 Forsyth Street
Atlanta, Georgia 30303
The Honorable John Ashcroft
Attorney General
U.S. Department of Justice
950 Pennsylvania Ave., NW
Washington, D.C. 20530-0001
The Honorable Betsy Child, Commissioner
Tennessee Department of Environment and Conservation
401 Church Street
Nashville, Tennessee 37243-2534
Amy Wood Malone, Esq., Colbert & Winstead,
Attorney for Upper Cumberland Regional Airport
Mary Mastin, Esq., Sierra Club, PEER, TEC, TCWN
Kristin Henry, Esq., Sierra Club
Joe McCaleb, Esq., Sierra Club, PEER, TEC, TCWN
Barry Sulkin, Tennessee PEER
Jeff Ruch, Esq., PEER
Will Calloway, Executive Director, TEC
Renee Hoyos, Executive Director, TCWN

**GROUND WATER TRACING RESULTS FROM THE
WETLANDS ADJACENT TO THE UPPER CUMBERLAND
REGIONAL AIRPORT, SPARTA, TENNESSEE**

Prepared for:

**Joe McCaleb and Mary Mastin,
Attorneys at Law**

Prepared by:

**Albert E. Ogden, Ph.D., P.G.
6478 Jones Lane, Murfreesboro, Tennessee 37127
(615) 907-0004**

June 24th, 2004

EXHIBIT A

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GROUND WATER TRACING RESULTS FROM THE WETLANDS ADJACENT TO THE UPPER CUMBERLAND REGIONAL AIRPORT, SPARTA, TENNESSEE

INTRODUCTION AND PURPOSE

At the request of Joe McCaleb and Mary Mastin, Attorneys-at-Law, a ground water tracing investigation was initiated in close proximity to the Upper Cumberland Regional Airport. The primary purpose of the study was to determine if the sinking stream exiting the wetlands east of the airport is hydrologically connected to a spring along the Falling Water River. This subterranean flow path was successfully established through the tracing efforts. This report will present the methods and results of the investigation.

STUDY AREA

The study area is located northwest of Sparta, in White County, Tennessee. Figure 1, taken from the Burgess Falls, 7 ½ minute U.S.G.S. topographic map, shows the location of the Upper Cumberland Regional Airport, the wetlands and areas involved with the ground water tracing.

HYDROGEOLOGIC SETTING

The Upper Cumberland Regional Airport is located in the Eastern Highland Rim physiographic province which is underlain primarily by limestones of Mississippian age (Wilson, Jr. and Marcher, 1968). Figure 2 shows a schematic topographic and geologic cross-section of the Site, as well as, the ground water tracing results from the wetlands runoff to be discussed. The Airport Wetlands occur due to the thin veneer of clay-rich, impermeable Quaternary alluvium that is

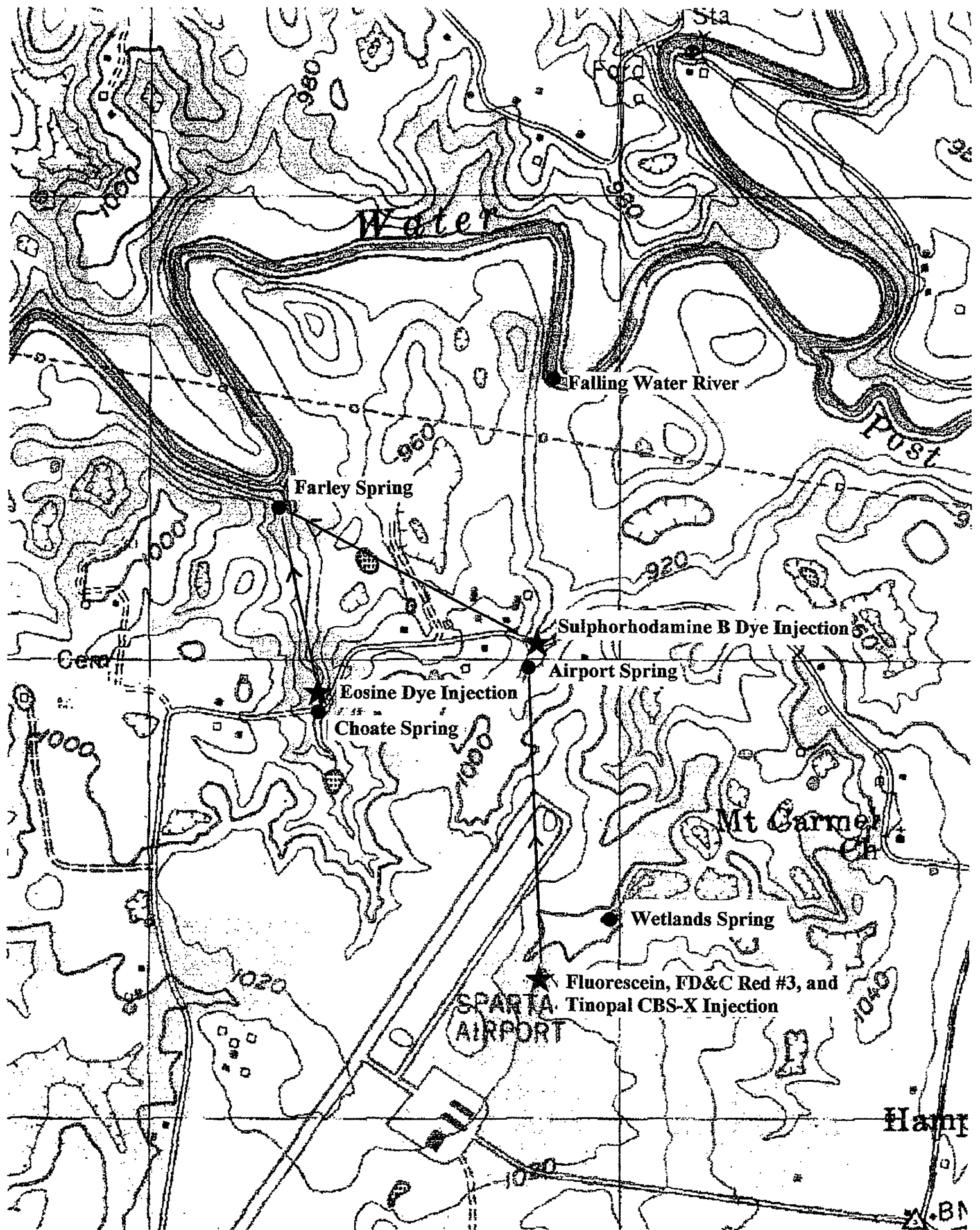


Figure 1. Location of the study area and ground water tracing results (Scale is 1:10,000).

Schematic Hydrogeologic Representation of the Tracing Results

Linear Distance, Formation Thickness, and Topography are Not to Scale

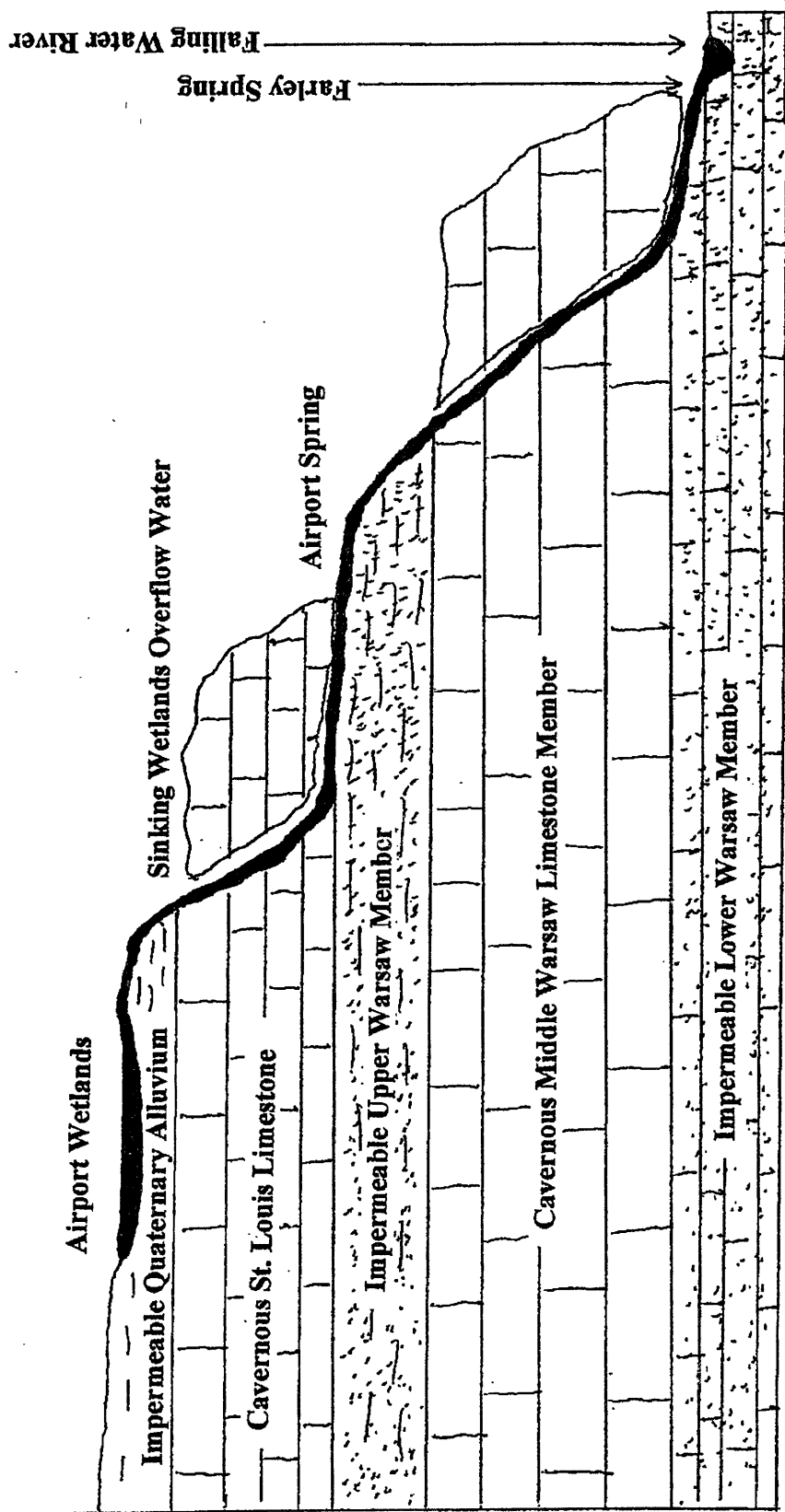


Figure 2. Schematic hydrogeologic representation of the tracing results.

found at the surface. Figure 3, adapted from the geology map by Wilson, Jr. and Marcher (1968), shows the naturally occurring wetlands before construction of the airport. Beneath the Quaternary alluvium is the karstic (cavernous) Mississippian-aged St. Louis Limestone. The Warsaw Limestone occurs below the St. Louis Limestone. The Warsaw Limestone is actually composed of three individual "members" of very different lithology and permeability. The upper Warsaw member is a cross-bedded, lime-rich siltstone/sandstone that perches ground water above it in the overlying St. Louis Limestone. As a result, springs such as Airport, Wetlands, and Choate springs are often found at the geologic contact. Beneath the upper Warsaw sandstone member is a sandy, cavernous limestone member. Ground water that emerges as spring flow quickly sinks upon intersecting the middle limestone Warsaw member. Beneath the limestone member is another impermeable member composed largely of shale, siltstone, and sandstone beds with occasional layers of sandy limestone. It is believed that Farley Springs emerges at the limestone member's contact with the lower impermeable Warsaw member.

GROUND WATER TRACING METHODS

The ground water traces were conducted using the following fluorescent dyes: eosine (pink), sulphorhodamine B (red), FD& C Red #3 (red), and fluorescein (green). In addition, an invisible optical brightener tracing agent called Tinopal CBS-X was used. These tracing agents are non-toxic and routinely approved for use by various divisions of the Tennessee Department of Environment and Conservation. Prior to conducting the ground water traces, the Tennessee Underground Injection Control Program was notified through their voluntary dye registration program. The injected tracing agents were detected by using activated charcoal packets that absorb and concentrate the level of tracing

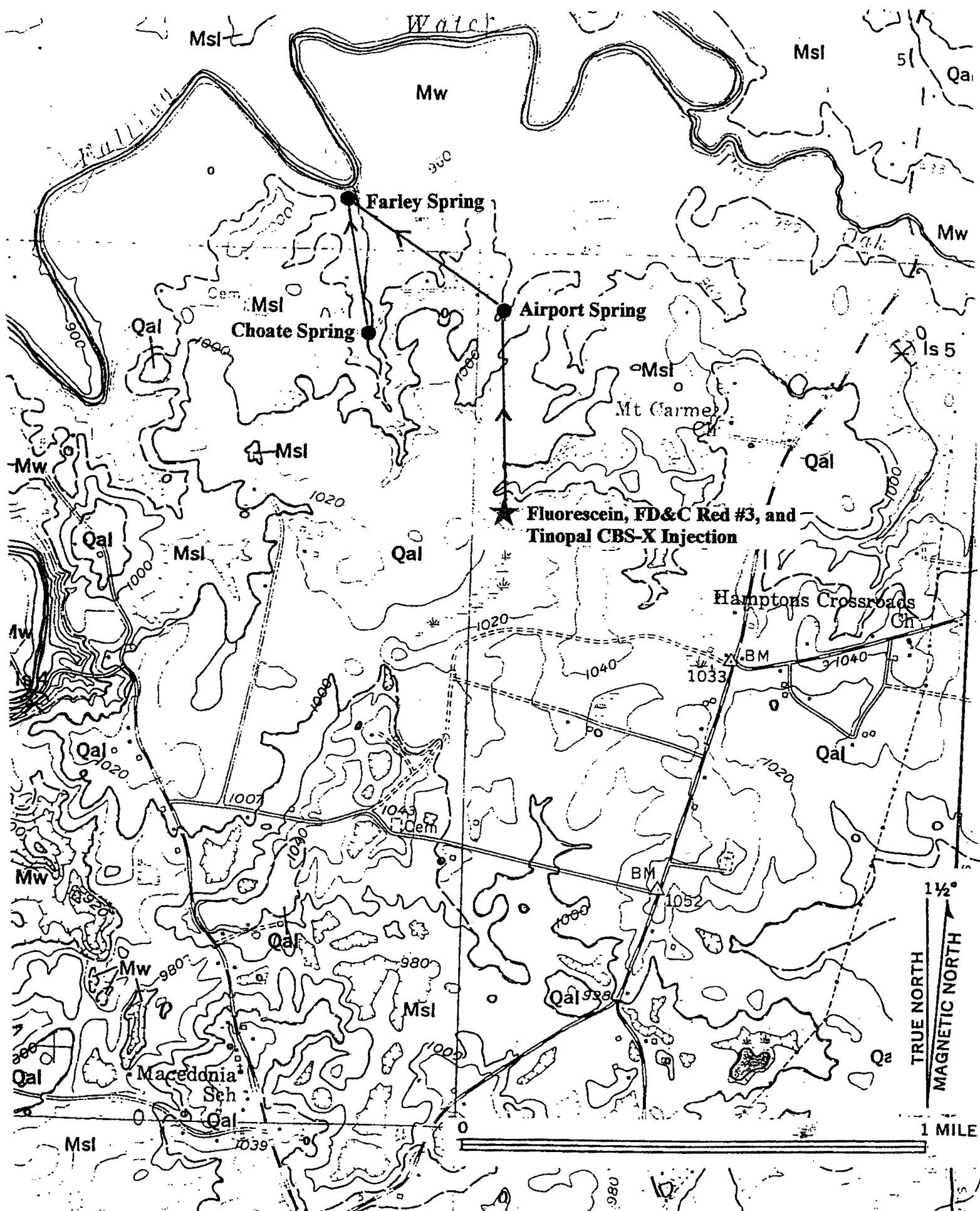


Figure 3. Geologic map of the study area (adapted from Wilson, Jr. and Marcher, 1969)

agent in the water. The charcoal packets, called "traps", are suspended in the waters expected to receive the dyes on a stiff wire connected to a concrete base. The concrete bases are referred to as "gumdrops". Prior to dye injection, the traps were placed in the waters for approximately a week to test for background concentrations. The dyes are common coloring agents and frequently are found as "contaminants" in the ground water. Once background levels were determined, new packets were set out immediately prior to injection. After injection of the dyes and optical brightener, the packets were changed four days later and then one week after that. The packets were sent to the laboratory under chain of custody procedures for analysis. The laboratory used for the project was Crawford Hydrology Lab, located at Western Kentucky University in Bowling Green. Analyses were performed using a scanning spectrofluorophotometer which can detect dye and optical brightener concentrations as low as a few parts per trillion.

GROUND WATER TRACING RESULTS

Three ground water traces were conducted. Table 1 presents the order of tracer injection, type and quantity of tracing agent injected at each point, and springs testing positive for the dyes. A summary of the laboratory results is presented in Appendix A. The interconnection of injection points and springs are shown on Figure 1. Straight lines have been drawn between the points of dye injection and sites testing positive for the tracing agents, but it should not be assumed that the tracing agents flowed in a straight line between points.

The author of this report first visited the site on June 1st, 2004. Water was observed leaving the wetlands area, and the sink point was identified. Below the wetlands, a large sinkhole complex with a spring at one end was walked to the northern edge where the water entered a small cave opening. A charcoal packet

was placed below the spring (called Wetlands Spring – Figure 1) to determine background levels of potential tracing agents to be used. Then a spring we called Airport Spring was visited, and a charcoal dye detection packet was placed in it. A charcoal packet was also placed in a nearby spring called Choate Spring. The waters from both Airport and Choate Spring soon re-enter the subsurface from their emergence points. The subterranean flow paths of these sinking streams, as well as, the water leaving the wetlands area, were all chosen to be traced. Next, Farley Spring was visited and a “boils” area in Falling Water River where a spring was thought to possibly exist under water level. Charcoal packets were placed at both of these sites.

TABLE 1. Summary of Dye Tracing Activities.

<u>Dye Injection Dates</u>	<u>Injection Locations</u>	<u>Sites Testing Positive</u>
6/10/04	Sink point below Airport Spring (½ lb. Sulphorhodamine B)	Farley Spring
6/10/04	Sink point below Choate Spring (½ lb. Eosine)	Farley Spring
6/10/04	Sink point of water leaving the Airport Wetlands (½ lb. Fluorescein, ½ lb. FD&C Red#3, and ½ lb. Tinopal CBS-X)	Farley Spring Airport Spring

On June 10th, the charcoal packets were collected and sent to the lab for analysis. A short canoe trip was taken down Falling Water River to see if any other springs occur that should be monitored before injecting the tracers. None were found. After the canoeing trip, the dyes were injected. To insure the integrity of the wetlands runoff trace, three tracing agents were mixed together

prior to injection. No party interested in the results of the investigation knew the identity of the mixture or that a mixture of tracers had been made. Therefore, if all three tracers were found at any monitoring location, it could not be argued that "tampering" of the detectors had occurred.

All three of the tracing agents injected into the sinking waters leaving the wetlands by the airport were detected at Airport Spring from the charcoal packets retrieved four days after injection (June 14th). Two of these tracers were detected at Farley Spring. It is believed that the third tracing agent (FD&C Red #3) was not found due to the low amount used and/or laboratory difficulty in separating eosine from FD&C Red #3 since both have similar fluorescent wavelengths. The dye injected at the sinkpoint of Airport Spring was also detected at Farley Spring, as would be expected. No tracing agent was detected at Wetlands Spring or Choate Spring. The dye injected at the sinkpoint of Choate Spring was also detected at Farley Spring. The last round of samples showed the same results, but tracer concentrations were less indicating most of the tracing agents had exited the spring systems four days after injection. The last samples, collected on June 21st, showed a very small amount of fluorescein at Wetland Spring and similar small amounts of fluorescein, sulphorhodamine B, and Tinopal CBS-X at the Falling Water River sample. These levels were approximately 1ppb or less and represent background concentrations expected to be flushed in by storms such as occurred between the sampling events.

SUMMARY AND CONCLUSIONS

Three ground water traces were successful in delineating much of the recharge area for Farley Spring. The waters that leave the wetlands east of the airport and soon sink into the ground, re-emerge first at Airport Spring (Figure 1).

This spring water then flows on the surface for only a short distance before re-entering the sub-surface. These sinking waters then emerge at Farley Spring located on the south side of the Falling Water River. The results of the investigation conclusively establish a hydrologic connection between the waters leaving the wetlands and Farley Spring, which contributes flow to the Falling Water River.

APPENDIX 1**Summary of Laboratory Results**

Crawford Hydrology Lab * Center for Cave and Karst Studies

* Hydrogeologists, Geologists, Environmental Scientists * Karst Geophysical Subsurface Investigations
* Karst Groundwater Investigations * Fluorescent Dye Analysis

Western Kentucky University

Bowling Green, KY 42101

(270) 745-9224

E-mail: caveandkarst@wku.edu

LABORATORY REPORT SHEET FLUORIMETRIC ANALYSIS RESULTS

Sparta, TN Project

Analysis requested by:

Dr. Albert E. Ogden

TINOPAL CBS-X	FLUORESCIN	EOSINE	FDAC RED #3	SULPHORODAMINE B
Triplet Brightening Agent 351	Color Index: Acid Yellow 73	Color Index: Acid Red 87	Color Index: Food Red 14	Color Index: Acid Red 52
Dye Receptor: Activated Charcoal	Dye Receptor: Activated Charcoal	Dye Receptor: Activated Charcoal	Dye Receptor: Activated Charcoal	Dye Receptor: Activated Charcoal
Analysis by: Spectrofluorophotometer	Analysis by: Spectrofluorophotometer	Analysis by: Spectrofluorophotometer	Analysis by: Spectrofluorophotometer	Analysis by: Spectrofluorophotometer

CHARCOAL AND WATER SAMPLES															
Code Number	Event	Date Collected	Feature Name	Pack #	Comment	TINOPAL CBS-X		FLUORESCIN		EOSINE		FDAC RED #3		SULPHORODAMINE B	
						Results	Conc in ppb	Results	Conc in ppb	Results	Conc in ppb	Results	Conc in ppb	Results	Conc in ppb
001-0	01	8/10/04	FALLING WATER RIVER					IB	0.231	ND		ND		IB	0.215
001-0	02	8/14/04	FALLING WATER RIVER		NS			++	1.104	ND		ND		++	1.437
001-0	03	8/21/04	FALLING WATER RIVER			B	0.102	IB	0.006	IB	0.025	ND		ND	
002-0	01	8/10/04	FARLEY SPRING					++	43.889	+++	281.497	ND		+++	1272.600
002-0	02	8/14/04	FARLEY SPRING					++	38.285	+++	102.181	ND		+	4.360
002-0	03	8/21/04	FARLEY SPRING			++	80.142	ND		IB	0.083	ND		ND	
003-0	01	8/10/04	AIRPORT SPRING					+++	1061.000	ND		++	253.162	ND	
003-0	02	8/14/04	AIRPORT SPRING					++	76.864	ND		+	69.186	ND	
003-0	03	8/21/04	AIRPORT SPRING			++	128.503	ND		IB	0.031	ND		ND	
004-0	01	8/10/04	CHOATE SPRING					ND		ND		ND		ND	
004-0	02	8/14/04	CHOATE SPRING					ND		ND		ND		ND	
004-0	03	8/21/04	CHOATE SPRING			ND		ND		B	0.034	ND		ND	
005-0	01	8/10/04	WETLAND SPRING			ND		ND		IB	0.022	ND		ND	
005-0	02	8/14/04	WETLAND SPRING					+	0.128	ND		ND		ND	
005-0	03	8/21/04	WETLAND SPRING			ND		+	0.091	ND		ND		ND	

Project:	Sparta, TN	Lab Manager	Approval Date
Contact:	Dr. Albert E. Ogden	Scott Roach	6/25/04

Comments: Combined All Sites GS = Grab Sample IB = Initial Background
+? = Crawford Protocol - a True Positive (+) only after two consecutive hits over ten times the initial background levels.

ND Below Quantitation Limit
B Background
NS No Sample

+ Positive
++ Very Positive

Created 6/25/04

EXHIBIT A



TENNESSEE DEPARTMENT OF ENVIRONMENT & CONSERVATION
Division of Water Pollution Control
401 Church Street
7th Floor, L & C Building
Nashville, TN 37243-1534

June 22, 2004

Ms. Mary M. Mastin, Esq.
Paddock and Mastin
360 Roberts Hollow Lane
Cookeville, TN 38501-9224

**RE: AQUATIC RESOURCE ALTERATION PERMIT (ARAP) #03-104
UPPER CUMBERLAND REGIONAL AIRPORT
WHITE COUNTY.**

Dear Mary:

The division received your letter of May 26, 2004 in regards to potential additional jurisdictional wetlands and possible stream impacts on the above referenced permit.

Pursuant to these allegations the division conducted a site visit on Friday, June 4, 2004 and phone conversation with the Tennessee Department of Transportation, Division of Aeronautics.

The field review resulted in our finding that the discharge from the wetland may after certain storm events connect with other waters of the state. This discharge, i.e. connection was authorized by this office on September 3, 1999 for the placement of a pipe to drain excess stormwater from the wetland. The conveyance that now exists from this pipe to potentially other waters of the state is a result of this more recent activity. The proposal to drain the wetland is covered under the SWPPP for this project. The wetland will be float pumped in a controlled manner via a constructed rip rapped diversion channel in which any discharge should not result in scouring, increased turbidity or in any manner affect the resource values of downstream waters. Water from the airport, the filled wetland as well as that from the east will go into the diversion channel.

The wetland will be backfilled with rock overlain by geotextile or similar material and then filled with dirt and capped with an impervious surface.

EXHIBIT B

MASTIN
PAGE 2.

The Division of Aeronautics in their environmental assessment has mistakenly listed the wetland impacts for the proposed project at 11.1 acres. A retraction/clarification letter is attached that acknowledges this and states that the impact is 10.08 acres as permitted. The 10.08 acre wetland was delineated in the field by Dr. Tom Roberts and Ken Morgan at Tennessee Technological University, verified with some modification by this office and then surveyed.

We appreciate your concerns in regards to the proposed project. However, based on our findings, TDEC does not propose to revoke or modify the ARAP. If you have any questions regarding this correspondence please contact me at (615) 532-0712 or Mike.Lee@state.tn.us.

Respectfully,



Mike Lee
Environmental Specialist
Natural Resources Section

enclosure

Cc Patrick Parker – TDEC/ Office of General Counsel
Jeff Patton – EAC/ Cookeville

RCR&A

RICHARD C. RINKS & ASSOCIATES, INC.

Engineers - Roof Consultants - Architects - Surveyors

Certified EIFS Inspection - Certified Moisture Analysis

ASCE - NSPE - TSPE - AIA - RCI - EDI

30 North Jefferson Avenue - P.O. Box 691 Cookeville, Tennessee 38503-0691

Telephone 931-528-5543 Richard@Rinks-Consulting.com Facsimile 931-528-5544

August 5, 2002

Mr. Mike Lee

Tennessee Department of Environment & Conservation

Division of Water Pollution Control

Natural Resources Section

6th Floor, L & C Annex

401 Church Street

Nashville, Tennessee 37243-1534

Telephone 615-532-0708 Facsimile 615-532-0046

✓ Mr. Carl Olsen

U. S. Army Corps of Engineers

Nashville District, Regulatory Branch

3701 Bell Road

Nashville, Tennessee 37214

Telephone 615-369-7500 Facsimile 615-369-7501

Gentlemen:

The Upper Cumberland Regional Airport (UCRA) needs to expand the landside operation to the east to meet the demands placed upon the Airport. The Airport has requested funds for this and other work and an FAA Grant has been announced by Congressman Bart Gordon for the Project. Some of the area involved in the Project is currently wetlands. The UCRA authorized Mr. Tom Roberts to delineate the wetlands. On Tuesday, April 16, 2002, Mr. Mike Lee walked the delineated wetland boundary and concurred with the delineation. On Friday, April 19, 2002 we surveyed the delineation boundaries. We will refer to the wetlands as Wetland 1 (7.90 acres), Wetland 2 (.806 acres), and Wetland 3 (1.37 acres), see attached drawing.

On Tuesday, May 28, 2002, representatives with the Tennessee Aeronautics Division (TAD) and the FAA met with the UCRA board and my staff to discuss the Project. The TAD and FAA support the need for this work and the UCRA Board has authorized me to request a permit from your agencies to utilize these wetlands for airport development with the required mitigation.

EXHIBIT C

Mr. Mike Lee & Mr. Carl Olsen

Page 2

August 5, 2002

On April 16, 2002, while Mr. Lee was in town, he was shown some possible mitigation sites by Mr. Roberts staff. It is hoped these favorable sites can be utilized to mitigate the wetlands the UCRA needs to utilize during this planned needed airport improvement.

Since time is critical on this Project, we need to know exactly what we must do to accomplish this Project. Now that we know the Grant has been awarded, we must obligate the funds as soon as possible. First we must know if the Airport can utilize the three wetlands for the airport expansion (a permit will be issued for utilizing the three (3) wetlands assuming agreeable mitigation is provided), and exactly what steps must be followed to obtain the permits.

The need to utilize these wetlands is critical for the airport to expand in a cost effective manner. All of the wetlands contribute to fog and water fowl activity, which is a safety concern to all aircraft utilizing the airport, especially jet aircraft. Other birds such as black birds and starlings also create a hazard to aircraft. With many on time deliveries for local industry, and corporate travel, the airport must serve a safe vital role to the economics of the region.

Wetland 1 will be essential to the airport for future ramp expansions to the east. It is not feasible to expand the north ramp further to the north. It is not feasible to move the landside operation to the west side of the airport, abandoning the existing eastside landside development.

Wetlands 2 and 3 are essential for the expansion of the landside development for future ramp and associated airport needs. In addition this area is much needed to provide additional airport security. As a result of the events of September 11, 2001, the FAA has mandated tighter security measures at airports. Access to Erlanger and future ramp developments will not be permitted to be on the airport ramps as is the case now. Access to the south must be along a secured path. Parking space and other access require the use of this wetland area. Again, it is not feasible to move the landside operation to the west side of the airport. FAA standards prohibit any expansion on the east closer to the runway.

The UCRA and my firm appreciate the cooperation your agencies have given us to date and we look forward to working with you on this project. Again, we need to know if a permit will be issued to utilize these three delineated wetlands if fair, acceptable and appropriate mitigation is provided and exactly what steps we must follow to expedite this process.

With our tight schedule, your prompt response to this matter will be appreciated.

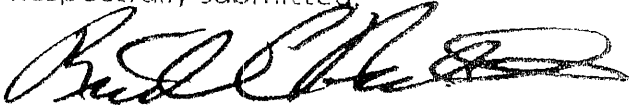
Mr. Mike Lee & Mr. Carl Olsen

Page 3

August 5, 2002

Should you have any questions concerning this matter, or if I may be of assistance in the future, please contact me

Respectfully submitted,



Richard C. Rinks, PE, AIA, RRC, RLS, CEIFS, CMA
President

copy: Mr. Tom Burgess, TAD-FAA
Mr. Tom Roberts, Wetland Consultant
Mr. Rick Bellar, UCRA Chairman

C:\a1g11c\WPW\ucra-wetland.let



990008540

DEPARTMENT OF THE ARMY
NASHVILLE DISTRICT, CORPS OF ENGINEERS
Regulatory Branch
3701 Bell RD
Nashville, TN 37214

September 11, 2002

Regulatory Branch

SUBJECT: Proposed Wetland Fill, Falling Water River, Burgess Falls Lake, White County, TN

Mr. Richard C. Rinks
30 North Jefferson Avenue
P.O. Box 691
Cookeville, Tennessee 38503-0691

Dear Mr. Rinks:

This is in response to your memorandum dated August 5, 2002, concerning the subject work.

Based upon the information provided in your letter, we have determined that the proposed work would not involve the discharge of fill material in waters of the US. In this regard, a Department of the Army permit is not required for this project.

We appreciate your awareness of our regulatory program. If you have any questions, you can contact me at the above address or telephone (615) 369-7517.

Sincerely,

Maryellen J. Ehmann
Regulatory Specialist
Operations Division

EXHIBIT D

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

2005 MAR 15 PM 1:06

NATIONAL WILDLIFE FEDERATION)
1400 16th Street, N.W., Suite 501)
Washington, D.C. 20036;)

TENNESSEE CLEAN WATER NETWORK)
706 Walnut Street)
Suite 200)
Knoxville, Tennessee 37228;)

TENNESSEE ENVIRONMENTAL COUNCIL)
One Vantage Way)
Suite D-105)
Nashville, Tennessee 37228;)

SIERRA CLUB)
85 Second Street, Second Floor)
San Francisco, CA 94105; and)

PUBLIC EMPLOYEES FOR ENVIRONMENTAL)
RESPONSIBILITY)
Tennessee Chapter)
4443 Pecan Valley Road)
Nashville, Tennessee 37218;)
Plaintiffs,)

v.)

UNITED STATES ARMY CORPS OF ENGINEERS,)
an agency of the United States; Lieutenant General)
ROBERT B. FLOWERS, Commander of the Corps;)
and)

UNITED STATES ENVIRONMENTAL PROTECTION)
AGENCY, an agency of the United States; and STEPHEN)
L. JOHNSON, Acting Administrator United States)
Environmental Protection Agency;)
Defendants.)

Civil No. 3 05 0217

DECLARATION OF
MARY JANE WARE

DECLARATION OF MARY JANE WARE

I, Mary Jane Ware, declare and state:

1. I am a citizen of the United States and resident of White County, Tennessee.
2. I am a Certified Rehabilitation Counselor serving as supervisor for the Tennessee Department of Human Services Division of Rehabilitation Services in Cookeville, Tennessee. I have been employed by the Division of Rehabilitation Services since 1997.
3. I am currently Outings Chair of the Upper Cumberland Sierra Club. I am a member of the Tennessee Scenic Rivers Association, Tennessee Parks and Greenways Foundation, Save Our Cumberland Mountains, and Tennessee Trails Association. I am design team chair helping to establish the Caney Fork Watershed Association, a member organization of the Cumberland River Compact. The mission statement of the Caney Fork Watershed Association is to promote conservation and improvement of the aquatic ecosystem of the watershed, so preservation of these wetlands interests me on an environmental as well as a personal level.
4. I was born and raised in White County, Tennessee. My great-great grandparents settled in the northern part of the county and established their home, first near a spring southeast of the Upper Cumberland Regional Airport (UCRA) and then their final residence was located on what is now the southern end of the runway, Ray Field, named in their honor. I had the fortunate experience of living on that property in the mid 1970's until the airport expansion became much too intrusive. The property surrounding the spring (approximately twenty-plus acres) is all that remains of the family farm and to this day is owned by the Ray heirs.
5. The proposed destruction of the wetland area at the Upper Cumberland Regional Airport in White County is most disturbing. As a resident of White County and a state employee working in Putnam County, I have an interest in the preservation of these exceptional wetlands.
6. Over the years, I have observed first-hand how the landscape has been altered by the growth and intrusion from the airport. There were sinkholes on my family property that were destroyed by the airport expansion. These sinkholes once played an important role in the storm water runoff management of the area. Rather than cause further destruction of our natural resources, it is my strong desire to maintain the integrity of the wetlands as an asset to the Upper Cumberland area, serving the very same individuals who benefit from the airport itself.
7. With the unique layout of the wetland (marsh ringed by a swamp), the educational opportunities are unlimited. Wheelchair accessible walkways could be constructed to the middle of the large marsh creating a viewing area for school children as well as adults. At

that viewing area or kiosk, one might see the unique natural beauty of the wetland and the delicate balance of nature that must be preserved. Even without construction of educational kiosks or walkways, the wetlands offer an exciting variety of plant and animal life unique to the area that would benefit visitors of all ages.

8. Not only should the wetlands be preserved for its beauty and for the wildlife dependent on its presence, but the wetlands at the UCRA serves a very functional purpose in the purification of storm water runoff from the airport. From the wetlands, storm water seeps through an underground, natural purification system, connecting with a nearby stream before reaching Falling Water River and finally Caney Fork River. This process cannot be replicated artificially and knowing that, it must guide any future decisions concerning the wetlands.
9. If these wetlands are not protected, their destruction and pollution will harm the water quality of the Falling Water River and other downstream waters and injure my recreational and aesthetic interests in the wetlands, the Falling Water River, and the Caney Fork River. The destruction or degradation of these wetlands would make me less likely to recreate downstream and would diminish the amount and quality of wildlife I enjoy observing in and around these waters. A decision by this court upholding federal protections for the wetlands would redress my injuries and alleviate my concerns.

I declare under penalty of perjury that the foregoing is true and correct.

This 12th day of March, 2005

A handwritten signature in cursive script, reading "Mary Jane Ware", is written over a horizontal line.

Mary Jane Ware, M.S., CRC

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

2005 MAR 13 PM 1:04

NATIONAL WILDLIFE FEDERATION)

58 State Street)

Montpelier, Vermont 05602;)

TENNESSEE CLEAN WATER NETWORK)

706 Walnut Street)

Suite 200)

Knoxville, Tennessee 37228;)

TENNESSEE ENVIRONMENTAL COUNCIL)

One Vantage Way)

Suite D-105)

Nashville, Tennessee 37228;)

SIERRA CLUB)

85 Second Street, Second Floor)

San Francisco, CA 94105; and)

PUBLIC EMPLOYEES FOR ENVIRONMENTAL)
RESPONSIBILITY)

Tennessee Chapter)

4443 Pecan Valley Road)

Nashville, Tennessee 37218;)

Plaintiffs,)

v.)

UNITED STATES ARMY CORPS OF ENGINEERS,)
an agency of the United States; Lieutenant General)

ROBERT B. FLOWERS, Commander of the Corps;)

and)

UNITED STATES ENVIRONMENTAL PROTECTION)
AGENCY, an agency of the United States; and STEPHEN)

L. JOHNSON, Acting Administrator United States)

Environmental Protection Agency;)

Defendants.)

DECLARATION OF
KATHLEEN RODGERS

CS 0217

DECLARATION OF KATHLEEN RODGERS

1. My name is Kathleen Rodgers. I am a citizen of the United States, a resident of Overton County, over the age of twenty-one, am competent to give testimony, and have personal knowledge of the facts stated herein.

2. I am a member of the National Wildlife Federation. The National Wildlife Federation is the nation's largest member supported nonprofit conservation and advocacy organization, with approximately one million members nationwide, including many members in Tennessee. NWF and its members are concerned about protecting wetlands and ensuring that the Federal Clean Water Act is applied to the full extent of the law to protect wetland and other areas vital to wildlife and human use.

3. I live near and am familiar with the wetlands that are proposed to be destroyed by the Upper Cumberland Regional Airport expansion. I have visited the wetlands and was impressed by the exceptional quality of the wetlands. These wetlands are one of the few wetlands in the area that provide an opportunity for me to view a large wetland area that retains water year round. Moreover, both the treed swamp area and open marsh area of the wetlands provide interesting opportunities for wildlife observation and enjoyment.

4. The Falling Water River and the Caney Fork River into which it flows provide wonderful hiking, wildlife observation, and other recreational opportunities for me. In particular, I often times enjoy the wildlife and beauty of the Burgess Falls area, which is approximately two miles downstream of the point where the airport wetlands flow into the Falling Water River. I have been told that Burgess Falls has one of the largest flows of any waterfalls east of the Mississippi and I have and intend to continue to bring friends and other guests there when they visit me because of the special beauty, hiking and wildlife viewing it

provides. Moreover, I have a BS degree in Plant and Soil Science and often enjoy observing and studying wildflowers in the Falling Water River and Burgess Falls area downstream of the

✓ UCRA wetlands. In fact, I have in the past, and may again in the future, lead wildflower hikes in the Falling Water River and Burgess Falls area.

5. I decided to become a member of NWF in large part because I care deeply about wildlife and wildlife habitat, such as the Falling Water River, Burgess Falls and the Caney Fork River and the wetlands that support and maintain these precious waters. As a conservationist and horticulturalist who lives near and enjoys these resources, I am concerned about the health of these rivers and their surrounding wetlands, and the continued impact that human activities are having on the rivers, their tributaries, nearby wetlands, and the aquatic life and wildlife that depend on these waters. I am particularly concerned with water quality in the segments of the Falling Water River beneath the point where the wetlands outlet into the river. Areas that provide great opportunities for recreation and wildlife viewing have already become noticeably degraded through poor management of the watershed. According to the State of Tennessee, the Falling Water River is "impaired" because the waterway is not meeting applicable water quality standards due to low levels of dissolved oxygen, organic enrichment and impairment.

6. I am concerned about the proposed destruction of the UCRA wetlands. If the Corps and EPA fail to exercise jurisdiction over these and other similar wetlands, then such waters could be used for the disposal of waste and fill without any governmental oversight. This is a disturbing prospect, especially since I recreate in and around the waters downstream of the wetlands and these waters are already polluted.

7. Given my recreational and aesthetic interests in these waters, I believe that I am injured by the withdrawal of federal authority over any of the waters located in the Falling Water

River and Caney Fork River watersheds. If these wetlands are not protected, their destruction and pollution will harm the water quality of the Falling Water River and other downstream waters and injure my recreational and aesthetic interests in the wetlands, the Falling Water River, and the Caney Fork River. The destruction or degradation of the UCRA wetlands would make me less likely to recreate in downstream waters and would diminish the amount and quality of wildlife I enjoy observing in and around these waters. A decision by this court upholding federal protections for the wetlands would redress my injuries and alleviate my concerns.

I declare under penalty of perjury that the foregoing is true and correct.

This 9 day of March, 2005.

Kathleen Rodgers

Kathleen Rodgers

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION**

SEP 15 10 11:10

NATIONAL WILDLIFE FEDERATION)

58 State Street)

Montpelier, Vermont 05602;)

TENNESSEE CLEAN WATER NETWORK)

706 Walnut Street)

Suite 200)

Knoxville, Tennessee 37228;)

TENNESSEE ENVIRONMENTAL COUNCIL)

One Vantage Way)

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SIERRA CLUB)

85 Second Street, Second Floor)

San Francisco, CA 94105; and)

PUBLIC EMPLOYEES FOR ENVIRONMENTAL)
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Tennessee Chapter)

4443 Pecan Valley Road)

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UNITED STATES ARMY CORPS OF ENGINEERS,)

an agency of the United States; Lieutenant General)

ROBERT B. FLOWERS, Commander of the Corps;)

and)

UNITED STATES ENVIRONMENTAL PROTECTION)

AGENCY, an agency of the United States; and STEPHEN)

L. JOHNSON, Acting Administrator United States)

Environmental Protection Agency;)

Defendants.)

Civil No. **03 05 0217**

**DECLARATION OF
BARRY SULKIN**

DECLARATION OF BARRY SULKIN

I, Barry Sulkin, declare and state:

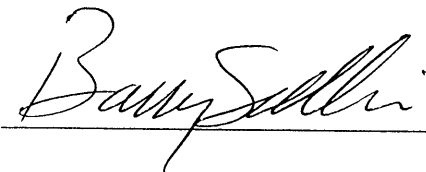
1. I am a citizen of the United States and resident of Nashville, in Davidson County, Tennessee. I am over twenty-one years of age, am competent to give testimony, and have personal knowledge of the facts stated herein.
2. I am currently Director of the Tennessee Chapter of the Public Employees for Environmental Responsibility. I have been a member of and represented PEER as the Director for the Tennessee Chapter for over six years. I am also an active member of the Tennessee Environmental Council (TEC) and on their Board of Directors.
3. PEER is a national non-profit corporation with chapters throughout the nation, including Tennessee. PEER represents current and former federal, state, and local employees of land management, wildlife protection, pollution control agencies, and the general public concerned about assuring that governmental agencies correctly enforce their statutory environmental mandates. PEER is concerned with ensuring that agencies charged with administering the CWA fully extend its protections to all jurisdictional waters.
4. TEC is a non-profit organization incorporated under the laws of the State of Tennessee that is dedicated to protecting and restoring water quality throughout the state. TEC has both individual and organizational members with a collective membership of over 400 individuals from throughout the State of Tennessee and beyond. TEC is dedicated to protecting its members' recreational, aesthetic, business, and environmental interests in waters of Tennessee from unregulated pollution and destruction.
5. I have been very concerned with the proposed destruction of the wetland area at the

Upper Cumberland Regional Airport in Sparta. I made comments to the Tennessee Department of Environment and Conservation opposing the Aquatic Resources Alteration Permit application for filling of the wetlands. In addition, PEER has a particular interest in protecting high quality waterbodies like these wetlands, and has participated in the revisions of the new Antidegradation provisions of the state's Water Quality Criteria, which are intended to provide additional protections for such waters.

6. I have visited the airport to observe the wetlands and explore the stream flowing out of the wetland. I am impressed with how exceptional these wetlands are for the middle Tennessee area. While many of our wetlands are relatively minor moist areas without significant standing water, or are small, intermittently flooded areas, the wetland at the airport is large and retains water throughout the year. The wetland presents for me and other residents of the state, and especially the Upper Cumberland area, the educational and recreational experience of viewing such a waterbody. It also provides an unusual habitat that is scarce in the area.

Besides the exceptional natural quality of the wetlands, it serves as an important resource in purifying the stormwater runoff from the airport. It is my understanding that water from the wetlands flows into the Falling Water River approximately two river miles above Burgess Falls, a waterfall which I have visited many times for personal recreation. Below Burgess Falls the flow joins the Caney Fork River, which here is part of Center Hill Lake – a regional recreation destination and which supplies Cookeville and other local communities with drinking water. The proposed destruction of the airport wetland would remove its resource value and one of its benefits of helping to purify the airport stormwater runoff water, cause more contaminated stormwater from the airport runway, hangars and parking areas to enter into Falling Water River,

This 8 day of March, 2005.

A handwritten signature in cursive script, reading "Barry Sulkin", written over a horizontal line.

Barry Sulkin

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION**

2005 MAR 18 PM 1:00

NATIONAL WILDLIFE FEDERATION
1400 16th Street, N.W., Suite 501
Washington, D.C. 20036;

TENNESSEE CLEAN WATER NETWORK
706 Walnut Street
Suite 200
Knoxville, Tennessee 37228;

TENNESSEE ENVIRONMENTAL COUNCIL
One Vantage Way
Suite D-105
Nashville, Tennessee 37228;

SIERRA CLUB
85 Second Street, Second Floor
San Francisco, CA 94105; and

PUBLIC EMPLOYEES FOR ENVIRONMENTAL
RESPONSIBILITY
Tennessee Chapter
4443 Pecan Valley Road
Nashville, Tennessee 37218;
Plaintiffs,

v.

UNITED STATES ARMY CORPS OF ENGINEERS,
an agency of the United States; Lieutenant General
ROBERT B. FLOWERS, Commander of the Corps;
and

UNITED STATES ENVIRONMENTAL PROTECTION
AGENCY, an agency of the United States; and STEPHEN
L. JOHNSON, Acting Administrator United States
Environmental Protection Agency;
Defendants.

**DECLARATION OF
JOHN HARWOOD**

3 05 0217

DECLARATION OF JOHN HARWOOD

I, John Harwood, declare and state:

1. I am a citizen of the United States and resident of Putnam County, Tennessee.
2. I am a professor of Chemistry at Tennessee Technological University in Cookeville, Tennessee, where I have served on the faculty since 1986.
3. I am currently Program Chair and am a former Group Chair of the Upper Cumberland Group of the Sierra Club. I represented the Sierra Club as the delegate for the Tennessee Chapter for three years. I also represented the Sierra Club on the Governor's Tennessee Forest Management Advisory Panel. I am a member of the Tennessee Clean Water Network and of the Tennessee Environmental Council, and have served on the boards of directors of both of these organizations. I am a design team member helping to establish the Caney Fork Watershed Association, a member organization of the Cumberland River Compact.
4. The Sierra Club is a national nonprofit organization of approximately 700,000 members "dedicated to exploring, enjoying, and protecting the wild places of the earth; to practicing and promoting the responsible use of the earth's ecosystems and resources; to educating and enlisting humanity to protect and restore the quality of the natural and human environment; and to using all lawful means to carry out these objectives". There are over 6000 Sierra Club members in Tennessee.
5. The Tennessee Clean Water Network ("TCWN") is a non-profit corporation headquartered in Knox County, Tennessee, composed of approximately 171 individual and organizational members. TCWN is dedicated solely to protecting, restoring and enhancing Tennessee's waters and the communities that depend on them. TCWN believes that water is the common thread that ties all life together and that maintaining clean water protects the health of our families and provides numerous recreational opportunities while sustaining plants, animals, and aquatic life. TCWN believes that Tennessee's waters are among our most precious natural resources. TCWN is dedicated to protecting the water resources of Tennessee, including ensuring that waters in Tennessee receive proper protection under the law.
6. The Tennessee Environmental Council ("TEC") is a non-profit organization incorporated under the laws of the State of Tennessee that is dedicated to protecting and restoring water quality throughout the state. TEC has both individual and organizational members with a collective membership of over 400 individuals from throughout the State of Tennessee and beyond. TEC is dedicated to protecting its members' recreational, aesthetic, business, and environmental interests in waters of Tennessee from unregulated pollution and destruction.
7. I have been very concerned with the proposed destruction of the wetland area at the Upper Cumberland Regional Airport in Sparta. I made comments to the Tennessee Department of Environment and Conservation (TDEC) opposing the Aquatic Resources Alteration Permit

(ARAP) application for filling of the wetlands.

8. I have visited the airport on several occasions to observe the wetlands. I am impressed with how exceptional these wetlands are for the middle Tennessee area. While many of our wetlands are moist areas without significant standing water, or are small, intermittently flooded areas, the wetland at the airport wetland is large and retains water throughout the year. The wetland presents for me and other residents of the Upper Cumberland the educational and recreational experience of viewing a marsh ringed by a swamp.

On my first visit to the wetlands, I observed two men in a boat fishing in the largest of the three wetlands. I have visited the wetlands with two area naturalists, who were both impressed with the unique size and quality of the wetlands. These observations have strengthened my hope that the wetlands might be made into a natural park to serve local residents and visitors to our airport.

I have visited the proposed mitigation sites along with TDEC's ARAP permit writer, Mike Lee. One of these areas is very important site for preserving the unique diversity of plant species in the Upper Cumberland Plateau. The other area is a an upland area containing an pond with a red clay basin. I do not believe that either of these areas could replace the resource value of the present airport wetland.

Besides the unique natural quality the wetland, it serves as an important resource in purifying the stormwater runoff from the airport. When the water leaves the airport wetland it flows briefly underground and re-emerges in a stream. This stream is less than three-quarters of a mile from Falling Water River. Though the stream returns underground, the water enters the river approximately two river miles above Burgess Falls, a waterfall which I am told has the second largest flow of any water fall east of the Mississippi River, and which is the primary feature of one of our premier state parks, Burgess Falls State Natural Area. Below Burgess Falls the river has been dammed to create Center Hill Lake, which is a regional recreation destination and which supplies Cookeville and other local communities with drinking water. The proposed destruction of the airport wetland would remove its resource value of purifying the airport stormwater runoff water, and cause untreated, contaminated stormwater from the airport runway, hangars and parking areas to enter into Falling Water River, impacting the water quality of Falling Water River at Burgess Falls and of Center Hill Lake.

9. Like many others, I have chosen to live in the Upper Cumberland Plateau region to enjoy the quality of life provided by our world class natural heritage. I am an avid hiker and nature photographer. I often visit Burgess Fall State Natural Area, and regularly visit Center Hill Lake.

Besides loss of a wetland which could be developed to serve as a recreational and educational feature for local residents and visitors to the airport, I am concerned that the destruction of the wetland at the airport will diminish the quality of Falling Water River, Burgess Fall State Park, and Center Hill Lake

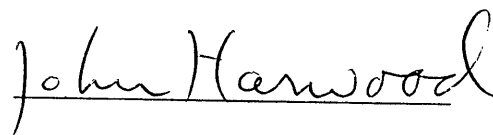
10. I have written articles for the newsletters of both our Upper Cumberland Group of the Sierra Club and our statewide Chapter of the Sierra Club during the past year concerning the importance

of wetlands in general, the fact that they are at risk by increasing development and the very uniqueness of this wetland in particular.

11. If these wetlands are not protected, their destruction and pollution will harm the water quality of the Falling Water River and other downstream waters and injure my recreational and aesthetic interests in the wetlands, the Falling Water River, and the Caney Fork River. The destruction or degradation of these wetlands would make me less likely to recreate downstream and would diminish the amount and quality of wildlife I enjoy observing in and around these waters. A decision by this court upholding federal protections for the wetlands would redress my injuries and alleviate my concerns.

12. I declare under penalty of perjury that the foregoing is true and correct.

This 4 day of March 2005

A handwritten signature in cursive script that reads "John Harwood". The signature is written in dark ink and is positioned above a horizontal line.

John Harwood, Ph.D.

DECLARATION OF STEPHEN J. STEDMAN

8 05 0217 03/11/10 11:07

I, Stephen J. Stedman, declare and state:

1. I am a citizen of the United States and resident of Putnam County, Tennessee. I am over the age of twenty-one, am competent to give testimony, and have personal knowledge of the facts stated herein.
2. I am a professor of English at Tennessee Technological University in Cookeville, Tennessee, where I have served on the faculty since 1987.
3. I am currently a member of the Upper Cumberland Group of the Sierra Club and have been since 1995.
4. The Sierra Club is a national nonprofit organization of approximately 700,000 members "dedicated to exploring, enjoying, and protecting the wild places of the earth; to practicing and promoting the responsible use of the earth's ecosystems and resources; to educating and enlisting humanity to protect and restore the quality of the natural and human environment; and to using all lawful means to carry out these objectives." Sierra Club and many of its members, including myself, are committed to ensuring waters in Tennessee and elsewhere receive proper protection under the law. There are over 6000 Sierra Club members in Tennessee.
5. I have been very concerned with the proposed destruction of the wetland area at the Upper Cumberland Regional Airport in Sparta. I made comments to the Tennessee Department of Environment and Conservation (TDEC) opposing the Aquatic Resources Alteration Permit (ARAP) application for filling of the wetlands.
6. I have visited the airport on at least 100 occasions since 1987 to observe the wetlands. I am impressed with how exceptional these wetlands are for the middle Tennessee area. While many of our wetlands are moist areas without significant standing water or are small, intermittently flooded areas, the wetland at the airport wetland is large and retains water throughout the year. The wetland provides for me and other residents of the Upper Cumberland the educational and recreational experience of viewing a marsh ringed by a swamp. I am very impressed with the size and quality of the wetlands and their habitat. In particular the birdlife of the wetland has impressed me. I have observed about 50 species of birds in and near the wetland over the years. Some of these, such a Tree Swallow and Red-headed Woodpecker, are uncommon breeding species within the Upper Cumberland Region because they require specific habitat in which to breed; this habitat is provided by the airport wetland, one of few such sites within the surrounding area.

I have visited one of the proposed mitigation sites along with TDEC's ARAP permit writer, Mike Lee. This area, on Breeding Swamp Rd., is very important site for preserving the unique diversity of plant species in the Upper Cumberland Plateau. The other area, which I have not visited, is an upland area containing a pond with a red clay basin. Neither of these areas appears to contain the type of the extraordinary resource value of the airport wetland.

Besides the unique natural quality the airport wetland, it serves as an important resource in purifying the storm water runoff from the airport. When the water leaves the airport wetland it flows briefly underground and re-emerges in a stream. This stream is less than three-quarters of a mile from Falling Water River. Though the stream returns underground, the water enters the river approximately two river miles above Burgess Falls, a waterfall that has the second largest flow of any water fall east of the Mississippi River, and that is the primary feature of one of our state parks, Burgess Falls State Natural Area. Below Burgess Falls the river has been dammed to create Center Hill Lake, a regional recreation destination that supplies Cookeville and other local communities with drinking water. The proposed destruction of the airport wetland would remove its resource value of purifying the airport storm water runoff water, and cause untreated, contaminated storm water from the airport runway, hangars a

7. Like many others, I have chosen to live in the Upper Cumberland Plateau region to enjoy the quality of life provided by our high value natural heritage. I am an avid amateur ornithologist. I have made over 100 visits to Burgess Fall State Natural Area since 1987 and more than 300 visits to Center Hill Lake during that time.

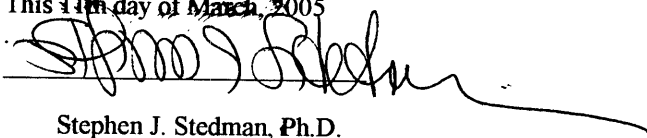
Besides loss of a wetland which could be developed to serve as a recreational and educational feature for local residents and visitors to the airport, I am concerned that the destruction of the wetland at the airport will diminish the

quality of Falling Water River, Burgess Falls State Natural Area, and Center Hill Lake.

8. If these wetlands are not protected, their destruction and pollution will reduce the water quality of the Falling Water River and other downstream waters and affect my recreational and aesthetic interests in the wetlands, the Falling Water River, and possibly Center Hill Lake. A decision by this court upholding federal protection for the airport wetlands would redress my injuries and alleviate my concerns.

9. I declare under penalty of perjury that the foregoing is true and correct.

This 14th day of March, 2005

A handwritten signature in black ink, appearing to read "Stephen J. Stedman", written over a horizontal line.

Stephen J. Stedman, Ph.D.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
NASHVILLE DIVISION

FILED
RECEIVED IN P. 11:00

MIDDLE DISTRICT OF TN

NATIONAL WILDLIFE FEDERATION
1400 16th Street, N.W., Suite 501
Washington, D.C. 20036;

TENNESSEE CLEAN WATER NETWORK
706 Walnut Street
Suite 200
Knoxville, Tennessee 37228;

TENNESSEE ENVIRONMENTAL COUNCIL
One Vantage Way
Suite D-105
Nashville, Tennessee 37228;

SIERRA CLUB
85 Second Street, Second Floor
San Francisco, CA 94105; and

PUBLIC EMPLOYEES FOR ENVIRONMENTAL
RESPONSIBILITY
Tennessee Chapter
4443 Pecan Valley Road
Nashville, Tennessee 37218;
Plaintiffs,

v.

UNITED STATES ARMY CORPS OF ENGINEERS,
an agency of the United States; Lieutenant General
ROBERT B. FLOWERS, Commander of the Corps;
and

UNITED STATES ENVIRONMENTAL PROTECTION
AGENCY, an agency of the United States; and STEPHEN
L. JOHNSON, Acting Administrator United States
Environmental Protection Agency;
Defendants.

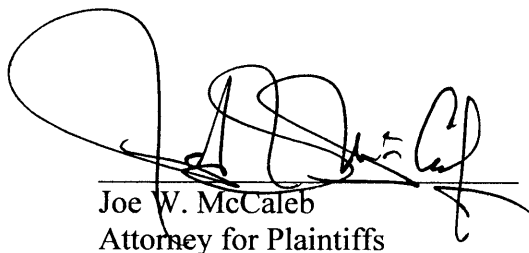
Civil No. 3 05 0217

JUDGE TRAUBER

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Civil Procedure 7.1 and Local Rule 8(a)(3), Plaintiffs
National Wildlife Federation, Tennessee Clean Water Network, Tennessee
Environmental Council, Sierra Club, and Public Employees for Environmental
Responsibility state that they are all not-for-profit corporations and they have no parent
companies, subsidiaries, or affiliates who have issued shares to the public.

This 16th day of March, 2005.



Joe W. McCaleb
Attorney for Plaintiffs



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Stephen L. Johnson, Acting Administrator
U.S. Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Ave., NW
Washington, DC 20460

